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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

COLUMBIA GORGE UNITED—
PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

CLAYTON K. YEUTTER, Secretary of Agriculture
of the United States; and the
COLUMBIA RIVER GORGE COMMISSION,

Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE,

Intervenor-Respondent.

**Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The Columbia River Gorge National Scenic Area Act (the Gorge Act), 16 U.S.C. §§ 544-544p, purports to establish a compact between the States of Washington and Oregon whereby a commission, subject to veto power by the Secretary of Agriculture, shall establish local land use controls for federal, state, and private property. These land use controls must be adopted by local governmental entities. Has the federal government unlawfully usurped the power of the states and local communities in violation of the Commerce Clause, the Tenth Amendment, the Guarantee Clause, the Property Clause, and the Compacts Clause of the United States?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this action.

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DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals, *Columbia River [sic] Gorge United—Protecting People and Property v. Yeutter*, No. 90-35588, is reported at 960 F.2d 110 (9th Cir. 1992), and is reproduced as Appendix A. Page references are to the version in the appendix.

The decision of the Federal District Court of Oregon, Case No. CV 88-1319-PA, is reported at 21 Envt'l L. Rep. 21,162 (1990), and reproduced in Appendix B.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on March 30, 1992, and was filed that same day. No petition for rehearing was sought. In accordance with Supreme Court Rule 13, this petition for certiorari is timely filed. This case involves a constitutional challenge to a federal statute. As such, the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331. This petition is being filed in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this case are the Commerce Clause, Art. I, § 8, No. 3; the Property Clause, Art. IV, § 3, No. 2; the Compacts Clause, Art. I, § 10, No. 3; the Guarantee Clause, Art. IV, § 4; and the Tenth Amendment to the United States Constitution. The relevant constitutional provisions are spelled out in Appendix C, except for the Guarantee Clause which provides that the "United States shall guarantee to every State in this Union a Republican Form of Government."

Statutory provisions at issue are the provisions of the Gorge Act, codified at 16 U.S.C. §§ 544-544p, Pub. L. No. 99-663, 100 Stat. 4274 (1986), as set out in Appendix D.

STATEMENT OF THE CASE

This petition involves a challenge to the constitutionality of the Gorge Act, 16 U.S.C. §§ 544-544p, Pub. L. No. 99-663, 100 Stat. 4274 (1986).

The Gorge Act was signed into law on November 17, 1986. Members of petitioner association, Columbia Gorge United—Protecting People and Property (CGU), are persons who own real property in the Columbia River Gorge and who have been adversely affected by the Gorge Act. Defendants are the Secretary, to whom the Gorge Act grants plenipotentiary supervisory power over all land use decisions in the Gorge, and the Columbia River Gorge Commission (Commission) which is the governmental agency that enforces the terms of the Gorge Act.

On November 16, 1988, pursuant to 28 U.S.C. § 1331, petitioner filed a complaint in Federal District Court in Oregon seeking declaratory and injunctive relief, specifically requesting that the court find the Gorge Act unlawful and enjoining the Secretary and the Columbia Gorge Commission from carrying out the mandates of the Gorge Act.

The Columbia River Gorge National Scenic Area Act divides the Gorge into three parts: Urban Areas, General Management Areas (GMAs), and Special Management Areas (SMAs). The federal government owns virtually no land in the Urban Areas, approximately 1.9% in GMAs, and 37.5%, mostly national forest land, in SMAs.[1] *See*

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[1] The total scenic area covers 285,087 acres, which includes 31,500 acres of the Columbia River itself. At the time of the passage of the Act, the Urban Areas contained 28,000 acres of land. The GMAs had 113,257 acres of nonriver land and the SMAs 112,330 acres.

(Continued on following page)

Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 934, *et seq.* (1987).

Overall, the federal government owns 17.4% of the land in the entire scenic area. Against this backdrop, Congress has surmised that the scenic qualities of the Gorge are outstanding, as they are, and that the scenic view somehow could not survive without the providence of federal intervention. Because of the federal government's rather limited direct interest and ownership of the area, it decided not to accomplish this directly. Instead, through a coercive compact mechanism, it drafted the cooperation of state and local governments in an attempt to legitimatize its foray into local land use planning.[2]

In the GMAs, 92.3% of the land was privately owned, 5.8% owned by state and local governments, and 1.9% federally owned. The SMAs contained 112,330 acres, of which 45.9% was owned by private individuals, 16.6% by state and local governments, and 37.5% by the federal government. Of the total area, the federal government owned 15.5% (44,204 out of 285,087 acres) or 17.4% of the total nonriver areas (44,204 out of 253,587 acres).

[2] Rather than being a model of harmonious legislating, the Act was subject to some bitter dispute in Congress. For example, Representative Robert F. Smith noted that initially under the Gorge bill Oregon's "land use laws would not be impacted nor superseded by any Federal authority." But as finally adopted, "none of those agreements, nor none of that pact has held up." 132 Cong. Rec. H10,486 (Oct. 16, 1986). Instead, the bill was enacted when "after midnight, the Rules Committee decided to send a bill to you that has never been to committee." 132 Cong. Rec. H10,463 (Oct. 16, 1986) (statement of Rep. Robert F. Smith). Representative Young claimed the Gorge Act was the product of a "midnight rule" and that "this is one of the worst examples of legislating that I have seen in my 14 years." 132 Cong. Rec. H10,464 (Oct. 16, 1986) (statement of Rep. Young).

A. Congress Created the Columbia River Gorge Commission to Enforce the Federal Act

Congress created the Commission, ostensibly out of a combination of state and local governmental appointees and charged it with the duty of enforcing congressional choices in land use planning. 16 U.S.C. § 544c.

The Commission oversees most major land use decisions in the Gorge pending adoption of local land use ordinances. Section 544h. The Secretary retains a veto power over decisions of the Commission. Sections 544d(f)(1), 544f(j), and 544h(c). The Commission can override a secretarial veto with a complex supermajority, but an override has implications for federal funding. Sections 544f(n), 544n. In the event that the Commission fails to abide by the federal design, then the Secretary has the option of encouraging compliance through withholding federal moneys or, under certain circumstances, simply by taking over the process through the use of the Secretary's powers of condemnation. *See, e.g.*, 16 U.S.C. §§ 544g, 544n.

B. The Scheme for Governing Special Management Areas Is Heavily Imbued with Federal Control

The most substantial impacts occur in SMAs. First, the Secretary, not the Commission, develops land use designations throughout the 112,238 acres in SMAs. 16 U.S.C. § 544f(e).

Second, the Secretary, after a formalistic "consultation" with the Commission, establishes all guidelines for SMAs. 16 U.S.C. § 544f(f). These guidelines must be incorporated in toto by the Commission in its mandatory

planning processes. 16 U.S.C. § 544f(f). The planning process must incorporate federally mandated criteria that ban virtually all major development. 16 U.S.C. 544d(d). The federalization of land management planning for an area *with so little federal land* is unique.[3]

Third, in SMAs the local county governments have been "deputized" and are required to adopt local ordinances consistent with the management plan—which for SMAs was promulgated by the Secretary. 16 U.S.C. § 544f(h). After promulgation, the Commission and then the Secretary must approve the ordinances. 16 U.S.C. §§ 544f(i) and (j). The Commission has the option of rewriting the ordinance with secretarial concurrence. 16 U.S.C. §§ 544f(k), (l), and (m). While the Commission may override the Secretary's nonconcurrence with a local ordinance, the ordinance must still be based upon the Act and is subject to secretarial and citizen enforcement for noncompliance with the Act. 16 U.S.C. §§ 544m(b)(1) and (b)(2). An override will also result in the withholding of grant moneys to the recalcitrant county. 16 U.S.C. § 544f(n). Finally, an override will reinvigorate the Secretary's exercise of the power of eminent domain. 16 U.S.C. § 544g(b)(2)(B).

C. There Is Much Federal Control over General Management Areas

The federal government owns only 1.9% of the land within GMAs. Nevertheless, it has imposed federal

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[3] As a comparison, the Sawtooth National Recreation Area contains 96.9% federal land, while the Hell's Canyon National Recreation area contains 94% federal land.

control over land use planning. First, the Commission must adopt land use designations for the entire scenic area, including GMAs. 16 U.S.C. § 544d(b). However, rather than being an exercise of state sovereign power, the adoption of land use designations is controlled by the federal law of the Gorge Act. For example, the statute requires the Commission to designate forest lands, open space, and so on. 16 U.S.C. §§ 544d(b)(3) and (4). In some cases (Urban Areas), the Commission must simply incorporate land use designations previously specified by Congress. 16 U.S.C. § 544d(b)(7).

The Commission must adopt a management plan for the entire scenic area, including GMAs. 16 U.S.C. § 544d(c). Federal law requires that the plan "protect and enhance" resources such as forest lands, open space, and so on. 16 U.S.C. §§ 544d(d)(1) and (3). The Commission is forced to prohibit industrial use in nonurban scenic areas. 16 U.S.C. § 544d(d)(6).

Once the Commission adopts a plan, its lack of sovereign authority becomes manifest. The Secretary must review and concur with the plan. 16 U.S.C. § 544d(f). While the Commission may override the Secretary's veto, it may only do so with a complex supermajority vote and so long as the plan is consistent with the federal Act. 16 U.S.C. § 544d(f)(3). Local counties are also required to adopt local land use ordinances that are in conformance with the plan. 16 U.S.C. § 544e.

D. Pending Adoption of the Management Plan, the Commission Must Enforce the Forest Service's Interim Guidelines

In the beginning, all land use planning required by the Gorge Act was performed by the Secretary through

the Forest Service. 16 U.S.C. § 544h. Pursuant to this authority, the Forest Service drafted "Interim Guidelines" on June 30, 1987, which govern all land use planning outside the "urban areas." A copy of the Final Interim Guidelines (Interim Guidelines) is attached as Appendix E.

Until the management plan and local ordinances are adopted, the Commission is required to follow the Interim Guidelines in all land use decisions. Section 544h. These guidelines had a severe impact upon property owners in the Gorge. For example, in the SMAs and GMAs they prohibited conversion of agricultural land to residential, Interim Guidelines, Ch. III(C)(1)(a)(1); prohibit conversion of forest land to residential, Interim Guidelines, Ch. III(C)(2)(a)(2); prohibit lot line adjustments between neighboring properties if the seller would maintain a residence on a lot that is less than 40 acres, Interim Guidelines Ch. III(C)(6)(a)(1); and prohibit a wide range of other residential and commercial activities, Interim Guidelines, *passim*. Since the record was completed in the case below, the Interim Guidelines have been replaced with a much lengthier Final Management Plan with identical or similar land use restrictions, albeit with more detail attached.

Members of CGU have been denied permits and the ability to utilize their property as a result of the enforcement of the Gorge Act. *See* District Court opinion, Appendix B, at B7-8, B10-11. This injury continues with the final plan.

REASONS FOR GRANTING THE WRIT: THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

As Robert Bork stated in the context of the Constitution's Commerce, Taxing, and Spending Clauses:

> [T]he expansion of Congress's commerce, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left. That does not mean, however, that the Court must necessarily repeat its mistake as congressional legislation attempts to reach new subject areas.

Robert H. Bork, *The Tempting of America* 158 (1990). In the rush to "save the Gorge" from ourselves, we have rushed too swiftly over the people of the Columbia River Gorge. This petition is not about protecting the Gorge *from* people, but instead it is about protecting the *people* of the Gorge—their rights, their liberties, their property, and their dreams. This case does not threaten our future generations and their ability to make wise use of the Gorge; rather, it will preserve the rights of all generations—present and future—when they are threatened by expedient rather than reasoned approaches to worthy goals.

Unwilling to trust the local population and local institutions of democracy, Congress arrogated unto itself the power of imposing land use planning on the people of the Gorge. The States of Washington and Oregon, mesmerized by the lure of federal moneys, purported to join together in a federally mandated compact to legitimatize the usurpation of the powers of local government and the individual rights of the people of the Gorge. However, there are certain rights so inalienable, and certain principles of constitutional government so fundamental, that they cannot be apostatized for any amount of federal grant money.

James Madison wrote of the federal government that "its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and

inviolable sovereignty over all other objects." *The Federalist No. 39* (January 16, 1788) at 194 (J. Madison) (Bantam ed. 1982) (The Federalist Papers). The Gorge Act exceeds the outward permissible limits to the federal government's jurisdiction over local governmental affairs.

I

THE NINTH CIRCUIT EXPANDED THE SCOPE OF THE COMMERCE CLAUSE BEYOND CONSTITUTIONAL LIMITS

While CGU's challenge to the Act below demonstrated that *no* enumerated power in the Constitution can justify the federal control over the Gorge as embodied in the Gorge Act, the Ninth Circuit based its decision singularly on its interpretation of the Commerce Clause to the Constitution.

The Ninth Circuit mentioned, but did not reach, CGU's arguments that neither the Property Clause nor the Compact Clause provided the federal government with the authority taken under the Gorge Act. Nor did the Ninth Circuit reach the merits of CGU's arguments that the Gorge Act violated the Tenth Amendment and the Equal Protection Clause.

This case presents a unique opportunity for this Court to clarify whether the Commerce Clause gives Congress the power to regulate activities that have only a slight (or trivial) effect on commerce, when that regulation is not a means to the legitimate end of regulating actual commerce. As Professor Engdahl notes:

> [T]he necessary and proper clause authorizes Congress to make laws respecting subject matters extraneous to those enumerated as its "legitimate" concerns, *insofar as* those laws are reasonably deemed by Congress to be means of

> effectuating federal policy on some enumerated subject.

David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 Constitutional Commentary 93, 98 (1985) (emphasis in original). In the case of the Gorge Act, petitioners believe that local land use planning has only a trivial impact on interstate commerce. Moreover, Congress did not justify *this* regulation as a means to the legitimate end of regulating commerce. Instead, as shown below, Congress stated that the ultimate ends of the Act are twofold: first, the mere preservation of local aesthetic and similar resources and, second, federal involvement in the local economy in order to divert economic growth into urban areas. Without a legitimate enumerated commerce oriented end the regulation as a whole must fail. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting). Furthermore, the means chosen, not only is not "necessary and proper" to a legitimate end of regulating commerce, but it also contravenes the spirit of the Constitution, *see id.*, as will be discussed in Part II, *infra*.

The Ninth Circuit found that Commerce Clause jurisdiction extended to local government land use planning within the Gorge because the Gorge is the site of commercial activities such as tourism, logging, and fishing, and because the Gorge is "bisected by a navigable waterway" between two states and therefore "virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications." Appendix A at A-7. Furthermore the court found:

> There is thus no merit to the appellant's claim on appeal that by upholding the constitutionality of the Compact, we are upholding the

> authority of Congress to impose zoning regulations throughout the country. As the district court noted, Congress found this area to be one of critical national significance.

Appendix A at A-7.

This goes too far. Just because there is commercial activity located within a region with "interstate ramifications" does not mean that the federal government has jurisdiction to regulate all land use. This was never the intention behind the Constitution. Hamilton, for example, emphatically wrote that "the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." *The Federalist No. 17* (December 5, 1787) at 80.

Likewise, if all Congress had to do is declare an area to be "of critical national significance" in order to obtain Commerce Clause authority over local land use decisions, then there would be no limit whatsoever to federal jurisdiction. As just one example, according to a "Northern Forest Lands Study," which was written by the Forest Service and a governors' task force, 26 million acres of land in New England were found to be nationally significant for economics and recreation. Stephen C. Harper, Laura A. Falk, and Edward W. Rankin, *The Northern Forest Lands Study of New England and New York* at 1 (1990). The report was authorized by Congress in Pub. L. No. 100-446, 1988 U.S. Code Cong. & Admin. News at 102 Stat. 1774, and in reliance on a conference committee report, 134 Cong. Rec. at H6808 (Aug. 10, 1988). Under the Ninth Circuit's interpretation of the Commerce Clause, this would render the entire 26 million acres susceptible to federal land use zoning.

Without doubt, in the past 50 years this Court has discerned that the Commerce Clause gives the federal government broad powers indeed to regulate activities that affect commerce.[4] Surely, however, the federalization of local land use controls takes this process beyond reason and certainly beyond the intent behind the Constitution. If all that Congress must do to assert Commerce Clause jurisdiction is to claim that something is "nationally significant," then there might as well not be any reason to claim that the federal government is limited to its "enumerated powers" only. There would be *no* limits.

The Gorge Act goes beyond the limits set by prior cases which have interpreted the Commerce Clause most broadly. The Commerce Clause was given its most generous interpretation in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975*, at 50 (1980). Unlike the Gorge Act, however, the Agricultural Adjustment Act of 1938, the statute in *Wickard*, was directly targeted as a means necessary and proper to the regulation of commerce. The language of the 1938 Act expressly addressed how "to avoid surpluses and shortages and the consequent abnormally low or high wheat prices *and obstructions to commerce.*" 317 U.S. at 115 (emphasis added).

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[4] This is not to say that there are no serious misgivings from legal scholars. Richard Epstein, for example, believes that the New Deal expansion of the Commerce Clause resulted from faith in the benevolence of the national government but was based on questionable legal logic. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1449-54 (1987).

As discussed below, no such justification can be found in the Gorge Act, and courts should be reluctant to hypothesize constitutional justifications for statutes where Congress provides no legitimate and clear statement of purpose. That is because the analysis of whether or not a regulation is "necessary and proper" to effectuating the Commerce Clause power is judged on a rational basis test. *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). If Congress does not delineate with some degree of particularity how a statute is necessary and proper to the regulation of commerce there is little meaning to the rational basis test because Congress has provided nothing that can be judged. *See* Engdahl, *Sense and Nonsense*, 2 Constitutional Commentary at 110 n.68. As this Court has stated on numerous occasions, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *accord Hafer v. Melo*, 502 U.S. ___, 116 L. Ed. 2d 301, 310 (1991).

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the constitutionality of the Civil Rights Act of 1964 was upheld, primarily on the basis of the Commerce Clause. Section 201(c) of that Act contained a lengthy description of the nature of activities that were found to affect commerce. The Court had little trouble finding that Congress' regulation of restaurants and hotels was a necessary and proper means to the end of the regulation of commerce. Again, such a justification is not stated in the Gorge Act.

In *Katzenbach v. McClung*, 379 U.S. 294 (1964), the statute at issue involved extensive legislative history of testimony and affidavits submitted to Congress by a multitude of witnesses. This Court held that while Congress

made no formal findings the congressional record was replete with evidence of the burdens placed on interstate commerce by racial discrimination in restaurants. This Court found that the focus of the legislation was to prevent "far-reaching" harm to commerce. 379 U.S. at 301. Relying heavily on the companion *Heart of Atlanta Motel* case, this Court wrote:

> [T]he voluminous testimony [before the Senate and House Committees] presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

379 U.S. at 253.

The present statute, however, is virtually devoid of Commerce Clause justification. It states, in relevant part, that the statute's precatory purpose is:

> (1) to . . . protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and
>
> (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

16 U.S.C. § 544a. Compared to the statutes at issue in *Wickard* and *Heart of Atlanta Motel*, this is a slender reed indeed to justify a statute on the basis of the Commerce Clause. Protecting aesthetics is not the regulation of commerce. Nor is the attempt to divert growth from local rural areas to local urban areas while limiting such growth so that it is consistent with aesthetic and cultural concerns. Furthermore, by claiming to encourage growth, while in fact stifling it, the statute has *not* made any real findings that the legislation is part of Congress' necessary and proper authority to regulate commerce. The *only*

congressional history on the effect of the Gorge Act on commerce shows that such commerce would be stifled. On timber resources alone the United States Forest Service estimated:

> The loss in the allowable cut in the timber resource . . . is 17 million board feet . . . that means [a] direct and indirect job loss of 357 people . . . more than $10 million in direct economic loss would occur every year.

132 Cong. Rec. H10,486 (Oct. 16, 1986) (statement of Rep. Robert F. Smith). Thus, Congress' statement that the Gorge Act will encourage the local economy is unsupported and irrational. This Court, therefore, must review this case to help delineate the limits, if any, of the Commerce Clause.

The District Court[5] cited to several pages of the congressional record to buttress its arguments that Congress saw this as being a statute that affects commerce. *See* Appendix B at B-16. These references are, at best, obliquely related to commerce. The cited passages do not mention the words "impact," "interstate commerce," or refer to "effects on interstate commerce." The goal of this statute was not to deal with commerce but to protect scenery. The justification of "commerce" cannot be bootstrapped onto every realm of human endeavor that may affect commerce in order to justify congressional involvement. The Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27

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[5] Because the Ninth Circuit failed to analyze these issues, the District Court's analysis will be used as a foil to demonstrate the absence of Commerce Clause jurisdiction.

(1968). *See also* Laurence H. Tribe, *American Constitutional Law*, § 5-7 at 313-14 n.2 (2d ed. 1988).

Even if the limited preamble statement in the Act were construed as being Congress' justification under the Commerce Clause, it does not withstand scrutiny. The proper test for determining whether a statute fits within the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. at 323-24:

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Thus, there must be a nexus between the regulated activity and interstate commerce. Judicial inquiry is limited to discovering whether such a finding of nexus is rational and then to an inquiry over whether the regulatory scheme itself is rational.[6]

In this case, Congress did not claim to be acting under the Commerce Clause and made no findings at all that local land use decisions have any effect on interstate commerce. Even if land use decisions did have an effect on commerce, there is no reasonable connection between

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[6] The District Court, however, interprets the *Hodel* test to be: "A nexus must exist between regulating the development of the Scenic Area and Congress' goal." *See* Appendix B at B-17. This is too facile. Here Congress' goal was "to establish a national scenic area," 16 U.S.C. § 544a(1), which is not the same as promoting commerce. The relationship between a regulated activity and a congressional goal is not the same thing as a relationship between the regulation and commerce.

the commerce end of "encouraging growth" and the means of forbidding development. The notion that the local economy of the Gorge can be supported by stifling development is more than a poor policy choice, it is an insupportable and irrational conclusion. No economic studies were cited by Congress for the oxymoronic proposition that restricting growth encourages growth for the simple reason that none are known to exist. By banning a wide range of activities in SMAs and by forbidding the reasonable use of land throughout the entire scenic area, there can be no question that the local economy will *not* be "encouraged."

Thus, it can be seen that the legislation itself provides no suitable Commerce Clause justification for its foray into local land use planning. Furthermore, even if Congress did try to justify the Act under the Commerce Clause, there is no rational basis between the Act's ends and means.

Neither the Gorge Act nor the legislative history makes such a finding. Furthermore, the Ninth Circuit's discovery that commerce exists in the Gorge cannot justify the Gorge Act's extraordinary regulation--otherwise the federal government could zone every square inch of property in the United States under the theory that the zoning will affect commerce. No court has ever gone this far, and such an argument is not a reason for the courts to abdicate their responsibility to put a limit on the reach of the Commerce Clause. *See* Bork, *The Tempting of America* at 158.

The Gorge Act's claim that its goal is to "protect and support the economy" (consistent with resource protection) is incompatible with the *only* evidence regarding the impact of the Gorge Act which shows that the economy

will be stifled. 132 Cong. Rec. H10,486 (statement of Rep. Robert F. Smith). The rubric of "protect and support the economy" cannot be used as Commerce Clause justification of the statute. There is no rational connection between the regulation of the Gorge and the Gorge Act's only stated goal.

II

THE COLUMBIA GORGE LEGISLATION VIOLATES THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Tenth Amendment Is Integral to the Constitution; Many States Ratified the Constitution Only with the Express Recommendation That a Bill of Rights, Including a Version of the Tenth Amendment, Be Enacted

As Justice O'Connor has noted, when discussing the commerce power and the Tenth Amendment, "[i]t is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). In this case the Gorge Act impugns the meaningful existence of the Tenth Amendment. During the debate over the ratification of our Constitution, there was great concern that the new national government would subsume the sovereignty of the individual states. An overly large and powerful national government, it was feared, would remove the people from direct participation in democratic government, which would ultimately have the potential for tyranny. For example, Brutus feared that

> it will be found that the power retained by individual states, small as it is, will be a clog

> upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way.

Brutus, *Essay I* (October 18, 1787), from *The Anti-Federalist*, § 2.9.9 at 112.

Aware of this trepidation, James Madison tried to reassure the citizens of New York, repeatedly, in *The Federalist Papers*. For example, in *The Federalist No. 39*, he wrote that the new federal government's

> jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

The Federalist No. 39 (January 16, 1788) at 194 (J. Madison). As to the fear that the people would actually *prefer* the federal government, to the detriment of local authority, Madison wrote:

> But even in that case, the State governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.

The Federalist No. 46 (January 29, 1788) at 239 (J. Madison).

To put the Anti-Federalists' fears to rest once and for all, in 1791 the first ten amendments were ratified by the states, including the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. The Columbia Gorge Legislation Violates the Tenth Amendment Under Garcia v. San Antonio Metropolitan Transit Authority

Now that the Tenth Amendment is enshrined in the Constitution, this Court is faced with the question of whether and how to apply it. It is not and never has been expected that the federal government would attempt to negate state sovereignty overnight. Over the years, however, there has been a certain trend to compromise, or minimize, the force of the Tenth Amendment in the face of serious short-term expediency. As Laurence Tribe puts it:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

Laurence H. Tribe, *American Constitutional Law*, § 5-20 at 381. The answer to Tribe's question is clearly *yes*.

This Court's recent expatiation of the Tenth Amendment found in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, has often been viewed as having cut back on the force of the Tenth Amendment. Nonetheless, the Columbia River Gorge legislation intrudes so far into the field of local legislation that this Court has an opportunity to determine whether *Garcia* precludes a finding that *any* statute can ever be considered violative of the Tenth Amendment because it intrudes too far into local government.

When writing the majority opinion in *Garcia*, Justice Blackmun was persuaded that many of the tests employed by previous courts for discerning the essential elements of state sovereignty were fundamentally flawed and could only lead to inconsistent results which lacked a guiding principle. The error with each of these tests, Justice Blackmun notes, is that because state governments have the legitimate ability to experiment in

> any activity that their citizens choose for the common weal. . . . Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Garcia, 469 U.S. at 546. Rather than looking at governmental functions, the Court focused on

> principles of democratic self-governance. . . . If there are to be limits on the Federal Government's power to interfere with state functions—*as undoubtedly there are*—we must look elsewhere to find them.

Garcia, 469 U.S. at 547 (emphasis added). The District Court[7] below concluded that the Tenth Amendment has not been violated because *Garcia* must be read to preclude judicial review of Tenth Amendment claims. The court reasoned that the "political process" protects the states and the states agreed to the scheme in this instance. Appendix B at B-21-22. This is too facile a reading of *Garcia*.

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[7] Other than affirming the District Court decision, and noting the existence of Tenth Amendment arguments, the Ninth Circuit did not address the issue.

First, just because some members of the federal government's congressional delegation from Oregon and Washington supported the legislation does not validate the political process. The Tenth Amendment was not intended to be so easily disregarded through a vote or two from a state's congressional delegation, especially when it is realized that the Tenth Amendment protects more than mere state government.[8] *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *22-23 (1992).

Second, the "acquiescence" by the States of Washington and Oregon was hardly a model of voluntary contractual agreement—in this country at any rate. The states had absolutely no choice but to surrender to the Act. Not only would substantial grant moneys have been withheld, 16 U.S.C. §§ 544l(e) and 544n(c), but it would have become absolutely impossible for virtually any economic activity to take place in the Gorge. Title 16 U.S.C. § 544l(e)(1) states:

> [I]f the Commission has not been established . . . no new license or new permit . . . shall be issued under authority of *any* Federal law for *any* activity within the scenic area . . . which the Secretary, determines is inconsistent.

(Emphasis added.) For example, to perform virtually any activity within a wetland, a permit is required under

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[8] The language of the Tenth Amendment protects not only the states, but the people: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, *or to the people*." (Emphasis added.) The rights of the people, as protected in their state constitutions, have been violated as well. Internal affairs of the states are protected from usurpation. *Kansas v. Colorado*, 206 U.S. 46, 49 (1907). *See also The Federalist No. 45* (January 26, 1788) at 233 (J. Madison); and Engdahl, *Sense and Nonsense*, 2 Constitutional Commentary at 94-95.

Section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344. Likewise, ranchers need grazing permits to run cattle on Forest Service land. In fact, there is virtually no significant economic activity left today that does not need some federal permit or license.

In other words, if the states had resisted forming a commission and "joining" the compact, the Secretary would have assumed virtually dictatorial powers over the scenic area, with the authority to impose economic capital punishment through withholding of all proceeds from federal grant programs and the denial of all manner of federal permits. Clearly, this compact was not voluntary, and the intrusion of the federal government into local government is unprecedented and represents an "extraordinary defect[] in the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

C. The Gorge Legislation Improperly Compels State Government to Regulate on Behalf of Federal Interests

This Court's analysis of the Tenth Amendment in *South Carolina v. Baker* recognized that there could be an independent ground for a Tenth Amendment challenge to a federal statute. After finding that the statute in question did not implicate the "structure" of federalism or have a defect in the national political process as outlined in *Garcia*, this Court went on to note that *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 761-64 (1982) (*FERC*),

> left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests.

South Carolina, 485 U.S. at 513. Just like the nuclear waste statute in *New York v. United States*, the Gorge Act "directly compels" the precise "manner" in which state and local governments must legislate, in this case with the adoption of land use plans and enactment of zoning ordinances. The states were coerced into a Hobson's choice: accept the "compact" and enforce federal land use controls in contravention to the Tenth Amendment, or suffer economic capital punishment as the federal government condemns property and denies all manner of federal permits in contravention to the Commerce Clause.

D. The Gorge Legislation's Adverse Impact on Our "Republican Form of Government" Implicates a Violation of the Tenth Amendment

Laurence Tribe suggests that the Tenth Amendment's protection of state sovereignty can be conceptualized through reliance on the Constitution's guarantee of a republican form of government. L. Tribe, *American Constitutional Law* at 398. Article IV, Section 4, provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." Tribe argues:

> If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

L. Tribe, *American Constitutional Law* at 398.

James Madison saw the new union as being a republic which was partly federal and partly national in character. In *The Federalist No. 39*, Madison criticized the concept of a purely national government and the "*extent* of its powers." *The Federalist No. 39* (January 16, 1788) at 194

(J. Madison) (emphasis in original). In a purely national government, he cautioned, "local authorities are subordinate to the supreme; and may be controuled, directed or abolished by it at pleasure." *Id.* To avoid this possibility, the union is structured so that the local governments—the states—would retain "a residuary and inviolable sovereignty over all other objects." *Id.* Nowhere is there the idea that executive officers of the national government could exercise veto authority over local land use ordinances and legislation. Nowhere is there room for the Columbia River Gorge legislation, because it alters "the form or method of functioning of" local democractic control of land use in violation of the Guarantee Clause. *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *24-25.

III

THE COLUMBIA RIVER GORGE LEGISLATION CANNOT BE JUSTIFIED UNDER THE PROPERTY CLAUSE

The court below upheld the Gorge Act on the basis of the Commerce Clause and this Court is urged to review the decision as a means of clarifying the meaning of that clause and its interrelationship with the Tenth Amendment. However, it should also be noted that no other enumerated power can justify the Gorge Act. The remainder of this petition shall briefly explain why neither the Property Clause nor the Compacts Clause can support the Act. While the federal government is entitled to protect its property, even if this means restricting activities on state and private land, there must be some limits to this proposition. And if the exercise of fundamental rights might be restricted, the government bears a heavy burden

of justifying a restriction of those rights to protect federal property.[9]

Ownership of a small fraction of the total land acreage in an area hardly gives the owner of the fraction the right to control all uses of all other lands in the geographic region. Yet, this is precisely what Congress is attempting in the Gorge.

The Property Clause's efficacy in protecting federal land was first enunciated in *Camfield v. United States*, 167 U.S. 518 (1897), which involved a violation of the Enclosures Act, and later in *United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts [building fires] upon privately owned lands that imperil the publicly owned forests"); and *Kleppe v. State of New Mexico*, 426 U.S. 529, 545 (1976).[10] In these cases, certain principles emerge: The potential harm to federal land must be significant, and there must be some

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[9] Indeed, under the rationale of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the finding of a relationship between the potential harm and the ameliorative regulation that affects private property rights is subject to *heightened* scrutiny. The Court stated:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

483 U.S. at 834 (emphasis in original).

[10] According to Professor Engdahl, this exercise of federal jurisdiction over private property can be easily justified as a necessary and proper exercise of Congress' Article IV property power. David E. Engdahl, *State and Federal Power over Federal Property*, 18 Ariz. L. Rev. 283 (1976).

rational relation between the regulation of state and private property and the threat to the federal lands. *See, e.g.*, Ronald F. Frank and John H. Eckhardt, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce?,"* Vol. XV, No. 4, NAT. RESOURCES LAW. 663 (1983).

No such rationalization can exist in the Columbia River Gorge where the federal government owns only 17% of the landmass.

IV

THE GORGE LEGISLATION CANNOT BE JUSTIFIED AS A COMPACT

The Columbia River Gorge legislation cannot be justified on the ground that it is merely an advance ratification of a compact entered into by the States of Oregon and Washington. First, the Act is federal legislation that imparts substantial authority to the Secretary over local land use planning and legislating and as such violates the Commerce Clause and the Tenth Amendment. These violations cannot be cured by the unusual mechanism of using a "compact." "[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *22.

Second, no part of this compact originated with the states. Unlike every other compact previously approved, the states had *nothing* to do with its detail. While there have been instances where Congress granted consent in advance, *see, e.g., Cuyler v. Adams*, 449 U.S. 433 (1981), at least the states filled in the details of the compact.

Such consent by subterfuge has not fared well in other constitutional contexts, such as with the Appointments Clause, United States Constitution, Article II, Section 2, Clause 2, where this Court has ruled that the phrase "by and with the advice and consent of the Senate" limits Congress' power to advice and consent alone. Congress has been explicitly prohibited from nominating and independently appointing officials. *Buckley v. Valeo*, 424 U.S. 1 (1976). Neither can it circumvent the limitation of its Appointments Clause authority to a consent function by allowing the executive to nominate an official with executive powers while retaining control over that official. *Bowsher v. Synar*, 478 U.S. 714, 722-23, 726 (1986).[11]

In a leading article on the Compact Clause by Professors Frankfurter and Landis, the authors wrote:

> The persistence of federalism in this country in substantially its present form, namely, as a Union of States is, we submit, an assured fact. . . . This assumption, at any rate, underlies this paper—the continuance of the States approximately with their present legal autonomy, and not, like the departments of France, mere administrative divisions of the central government.

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[11] *See also* the Treaty Clause, United States Constitution, Art. II, § 2, cl. 2. In *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936), this Court held that

> the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

(Emphasis in original.)

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 687 (1925). Under the Gorge Act, local people and government are mere delegates of federal authority.

CONCLUSION

The Gorge has been in existence for a millennium. It will remain, magnificent and beautiful, for millennia to come. The Constitution has been in existence for 200 years. Because it is a political invention of people, in many ways it is more fragile and delicate than the Gorge. In order for it to retain its vitality for centuries to come, its language and meaning must not be sacrificed for expediency. The prejudices found in the national government against the abilities of local government must not be allowed to rewrite the essential elements of federalism found in the Constitution.

Government of the people and by the people is an essential truth of our constitutional government. As Alexis de Tocqueville wrote "'the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies.'" *FERC*, 456 U.S. at 789 (O'Connor, J., dissenting) (quoting Alexis de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961)). The townships and provincial assemblies were never intended to be marionettes of the national government. The Constitution limits the power of the federal government to its enumerated powers only. None of the enumerated powers makes it necessary and proper for agents of the federal government to assume the mantle of local legislators.

With the Gorge Act, this Court has an opportunity to solidify the principles of federalism most recently outlined in *New York v. United States*. This Court can decide whether these are practical limits to the Commerce Clause and whether states can be forced to choose between submitting to excessive federal regulation or enforcing that regulation.

The Gorge will survive. However, in order to ensure the *vitality* of the Constitution, this Court must grant this petition for writ of certiorari to fully consider whether or not the Gorge Act violates the Constitution by its unprecedented assumption of local land use control.

DATED: June, 1992.

Respectfully submitted,

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APPENDIX A*

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA RIVER GORGE UNITED-PROTECTING PEOPLE AND PROPERTY, *Plaintiff-Appellant,* v. CLAYTON K. YEUTTER, Secretary of Agriculture of the United States; COLUMBIA RIVER GORGE COMMISSION, *Defendants-Appellees,* FRIENDS OF THE COLUMBIA GORGE, INCORPORATED, *Defendant-Intervenor-Appellee.*	No. 90-35588 D.C. No. CV-88-1319-PA OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
September 10, 1991—Portland, Oregon

Filed March 30, 1992

Before: Alfred T. Goodwin, Mary M. Schroeder and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Schroeder

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

COUNSEL

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OPINION

SCHROEDER, Circuit Judge:

This is an action challenging the constitutionality of the Columbia River Gorge Scenic Area Act, 16 U.S.C. §§ 544-544p which was enacted in 1986. Its purposes were to protect the economy and enhance the scenic, cultural, recreational and natural resources of the Columbia River Gorge. The Gorge occupies a uniquely beautiful and rich area in Oregon and Washington bordering the Columbia River. The Act contemplated interim management of the area by the Secretary of Agriculture and long-term management by the Columbia Gorge Commission, an agency to be established by a compact between the two states. 16 U.S.C. § 544c. The Act set forth in some detail the manner in which the Commission was to function and conditioned Congress' consent to the Compact upon compliance with those conditions. The Compact has now

been entered into and the Commission is functioning according to the plan outlined in the Act.

The plaintiffs in this action, individual property owners, an organization called the "Columbia Gorge United - Protecting people and property," and members of that organization, claimed they were adversely affected by the operation of the Commission. They sued both the Secretary of Agriculture and the Commission alleging that the Act violated both the Federal and State Constitutions. Following a hearing on the merits, the district court granted summary judgment in a thoughtful opinion rejecting all of the plaintiffs' claims. Columbia River Gorge United is the sole appellant in this action, as it is the only party below that listed its name on the notice of appeal, thereby complying with the specificity requirement of Fed.R.App.P. 3(c). *See Benally v. Hodel*, 913 F.2d 1464, 1467 (9th Cir. 1990). In this appeal Columbia River Gorge United renews its contentions that the Act violates the United States Constitution, alleging specifically that the Act violates the Tenth Amendment, the Commerce, Property and Compact Clauses and the Fifth Amendment entitlement to equal protection.

Underlying all of appellant's contentions is the recurring theme that the Act and the Compact are contrary to the true wishes of the states of Oregon and Washington, and that the states were coerced into accepting conditions laid down by Congress. The Commission in this case is represented by the Attorneys General of both states who vigorously maintain that both the Act and the Compact were a product of mutual cooperation between federal and state governments to achieve a result satisfactory to both states. To the extent that appellant's arguments rest

upon issues of fact with respect to coercion, they have been resolved against the plaintiffs by the district court in findings which are not clearly erroneous. We therefore deal only with issues of law.

OPERATION OF THE ACT

The Act establishes a "partnership between the Federal Government, the States of Oregon and Washington, and the nearly 50 units of local government within the Columbia River Gorge for the purpose of protecting and enhancing" property and resources within the Gorge. 132 Cong. Rec. 29496 (Oct. 8, 1986) (remarks of Senator Hatfield). The Act accomplishes this goal by creating the Columbia River Gorge National Scenic Area and ratifying an interstate compact between Washington and Oregon which regulates land use and development activities within the Scenic Area.

The Act calls for the creation of a thirteen member Commission composed of three residents appointed by the three Oregon Gorge counties, three residents appointed by the three Washington Gorge counties, three members appointed by each state governor and one nonvoting Forest Service employee appointed by the Secretary of Agriculture. 16 U.S.C. § 544c. Once created, the Commission is charged with the development of a management plan that regulates, through land use ordinances, the development and use of various categories of land within the Scenic Area. In furtherance of this purpose, the Commission is, within the first year of its establishment, to complete a resource inventory, an economic opportunity study, and a recreational assessment of the

Scenic Area. 16 U.S.C. § 544d(a). Withing two years the Commission is to complete land use designations for privately owned land within the Scenic Area. 16 U.S.C. § 544d(b). The Secretary of Agriculture will, during this same period, take corresponding steps with respect to federally owned land within the Scenic Area. 16 U.S.C. § 544f.

Once these tasks are accomplished, the Commission is to develop and adopt a management plan for the Scenic Area. Under the Act, the Plan must include land use designations, management direction for the use of federal land, and guidelines for adoption of land use ordinances. After the Plan is approved by the Secretary of Agriculture, counties will be instructed to submit land use ordinances to the Commission for approval. If a county fails to submit an acceptable plan, the Commission is authorized to develop and implement a county plan that is consistent with the overall management plan.

Under the Act, and the resulting Compact, all land use within the Columbia River Gorge Scenic Area, whether private, federal or local, will be consistent with the management plan developed by the Commission. Congressional consent to this interstate compact is expressly contingent upon inclusion in the compact of all powers and responsibilities assigned to the Commission under the Act. 16 U.S.C. § 544o(d).

The Columbia River Gorge Compact was ratified by Oregon and Washington in 1987. The Compact incorporated the Gorge Act and established the Commission in accordance with the federal statute. Or.Rev.Stat. § 196.150 (1987); Wash.Rev.Code § 43.97.020 (1987).

DISCUSSION

We deal first with the appellant's contentions that the Act violates the authority granted to Congress in both the Commerce and Property Clauses of the Constitution and is therefore outside the scope of the legislative power granted to Congress by the United States Constitution.

The Commerce Clause, Article, I, Section 8, of the Constitution provides that Congress "shall have Power . . . to regulate Commerce with foreign Nations and among the several States." The Clause has, of course, been interpreted expansively to authorize regulation not only of channels and instrumentalities of interstate commerce but of "activities affecting commerce." *See, e.g., Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 276-277 (1981). Similarly, activity that is seemingly insignificant may be regulated where one individual's "contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). The district court correctly disposed of appellant's contention that the Act goes beyond this expansive power.

The district court found, and appellants do not dispute, that among Congress' concerns was a desire to preserve the beauty of the area for those who would travel to use the rivers and mountains in it for recreation, thus directly causing interstate travel. Congress also intended to regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce. These activities include logging and fishing. Moreover, and perhaps most important, the area itself is unique in that it consists of portions of two states

bisected by a navigable waterway. In such an area, virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (Congressional authority to regulate rivers is not limited to control for navigation, but is as broad as the needs of commerce and extends to flood protection, watershed development, and the recovery of cost of improvements). *See also Boone v. U.S.*, 944 F.2d 1489, 1492-93 (9th Cir. 1991) (federal government's authority to regulate navigable waters is coextensive with and parallel to expansive power to regulate commerce generally). Interstate bodies of water are frequently the subject of interstate compacts. *See, e.g.*, Tahoe Regional Planning Compact, Pub.L.No. 91-148, 83 Stat. 360 (1969); Delaware River Basin Compact, Pub.L.No. 87-328, 75 Stat. 688 (1961); Upper Colorado River Basin Compact, 63 Stat. 31 (1949). There is thus no merit to the appellant's claim on appeal that by upholding the constitutionality of the Compact, we are upholding the authority of Congress to impose zoning regulations throughout the country. As the district court noted, Congress found this area to be one of critical national significance.

Appellants also contend that the Act goes beyond the grant of authority to Congress under the Property Clause of the Constitution which provides that Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, Cl. 2. Appellants argue that even though some seventeen percent of the land in the affected area is federally owned, Congress may not regulate development in the

entire area. The district court agreed with appellees that development on non-federally owned land has a sufficient effect on federally owned land to justify regulations of such development under the Property Clause. They relied upon Supreme Court decisions which upheld federal regulation of non-federal land where the regulated activity on the non-federal land affected the activities on the federal land. *See Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897). In addition, the United States points out that it is difficult to see how the entire Act could be struck down by an attack on only those portions affecting non-federal land, since the Act has a severability clause. We need not determine, however, whether all or a portion of the Act would go beyond the reach of Congress' power under the Property Clause. We have already determined that the Act is within Congress' power under the Commerce Clause.

For a similar reason, the Act cannot be a violation of the Tenth Amendment. Since the Act is within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of a power reserved to the states. We therefore need not address the federal government's position that the appellants lack standing to assert the rights of the states under the Tenth Amendment.

We then turn to the appellant's contention that the regulatory system is a product of a compact that is not valid under the Compact Clause. Under the Compact Clause, U.S. Const., art. I, § 10, Cl. 3, any interstate agreement that increases the political power of states must be approved by Congress. "The relevant inquiry must be one of impact on [the] federal structure." *United*

States Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 471 (1978). All parties to this appeal agree that the Compact between Washington and Oregon, pursuant to which the Commission was established to oversee the Columbia River Gorge Area, is one which requires such congressional consent. Through the Act, Congress consented in advance to this Compact on the condition that the Compact contain certain specific provisions. Advance consent with requirements attached is itself perfectly valid, as the Supreme Court has held. *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981). This court has recently reaffirmed that Congress may condition consent upon a compact containing specific terms, including the creation of a compact agency. *See Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1364 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

The only distinction between *Seattle Master Builders* and this case is the appellant's assertion that this Act specifies in greater detail the provisions of the Compact it authorizes than the Pacific Northwest Power Planning and Conservation Act at issue in *Seattle Master Builders*. The fundamental objection to both this Compact and that in *Seattle Master Builders*, however, is essentially the same. Moreover, there are distinct benefits from the kind of detailed advance planning between states and the federal government that led to this Compact. Such planning is fully consistent with the purpose of the Compact Clause. Regional arrangements may represent a necessary method for handling problems, such as transportation, waste disposal and environmental preservation, which because of their interstate nature cannot be handled by individual states acting alone. Professors Landis and

Frankfurter, in their seminal article on the Compact Clause, strongly recommended the Compact devise for "fashioning new instruments adapted to new situations." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 688 (1925). Foresighted in their thinking, the authors understood that "imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by . . . growing interdependence." *Id.* at 729. As we pointed out in *Seattle Master Builders,* the compact has been used in a variety of unique situations to promote both state and federal interests: "An unusual feature of a compact does not make it invalid." *Seattle Master Builders,* 786 F.2d at 1364. The Columbia River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem.

The appellant finally contends that the Act violates the Fifth Amendment entitlement to equal protection because Gorge area residents must submit to local land use decisions made by non-elected officials, while state residents outside the Gorge area are subject to land use regulation only by elected officials. Insofar as the appellant argues that the Act violates electoral rights guaranteed by the state constitutions or local laws, this challenge fails. When Congress, acting within constitutional limits, creates federal law, state law is nullified to the extent that compliance with both the federal and the state law would be a physical impossibility. *Hillsborough County, Fla. v. Auto Med. Labs.,* 471 U.S. 707, 713 (1985).

The equal protection challenge lodged by the appellant is based upon geographic discrimination. Residents

outside the Gorge area get to vote for their land-use planners, while those inside the Gorge area do not. The equal protection clause, however, is not violated when a geographic area is singled out for different treatment. The Supreme Court has held that "there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'" *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954)). Different treatment of different areas is permissible, provided there are reasons for such treatment that do not reflect unconstitutional motivations. *Griffin*, 377 U.S. at 231. Preservation of the Columbia River Gorge Area is a permissible Congressional objective and a valid exercise of the power delegated to Congress under the Commerce Clause of the Constitution.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA GORGE UNITED-PROTECTING PEOPLE AND PROPERTY, et al.,

Plaintiff,

v.

CLAYTON K. YEUTTER, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Defendants,

and

FRIENDS OF THE COLUMBIA GORGE,

Defendant-Intervenor.

CV No. 88-1319-PA

OPINION

(Filed May 23 90)

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PANNER, J.

Plaintiffs Columbia Gorge United Organization and 19 individuals who own land in the Gorge area bring this action against defendants United States Secretary of Agriculture ("Secretary") and the Columbia River Gorge Commission ("Commission"). Plaintiffs seek a declaration that certain portions of the Columbia River Gorge National Scenic Area Act ("the Gorge Act") are unconstitutional

and an injunction prohibiting defendants from administering the Act. Plaintiffs contend that the Act is unconstitutional because it exceeds the constitutional grant of congressional power, because it violates the commerce clause, the property clause, the compact clause and the appointments clause, because the Gorge Act and the Compact deny electors equal protection of the law, because the Gorge Act denies plaintiffs due process of the law and because the Gorge Act and the Compact violate the supremacy and judicial power clauses of the Constitution. Plaintiffs also request certain members of the Commission be enjoined from deciding contested land development proposals and from implementing the Gorge Act. A court trial was held. I find for the defendants. This opinion comprises my findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND[1]

Congress enacted the Gorge Act in 1986 and thereby established the Columbia River Gorge National Scenic Area ("the Scenic Area"). 16 U.S.C. § 544, Pub. L. 99-663, 100 Stat. 4302 (1986). The Scenic Area was established to protect and enhance scenic, cultural, recreational, and natural resources, and to protect the economy of the Scenic Area. 16 U.S.C. § 544a. The Act sets boundaries for certain land pockets within the Area, which run along both sides of the Columbia River and in Oregon and Washington. These pockets are designated "urban areas"

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[1] The parties have stipulated to all the facts contained in this section.

("UAs") and "special management areas" ("SMAs") and include both publicly and privately held land. The undesignated parcels are referred to as "general management areas" ("GMAs"). Congress authorized the federal and state governments to promulgate land use plans and laws which regulate land development within the SMAs and GMAs. As of November 17, 1986, when the Gorge Act was enacted, the United States owned approximately 17 percent of Area lands. More than 68 percent of land in the Area was privately owned.

In 1987, Oregon and Washington ratified the Columbia River Gorge Compact ("Compact"), which incorporated the Gorge Act and established the Commission in accordance with the Gorge Act's requirements. ORS 390.420; Wash. Rev. Code § 43.97.020. During May and June 1987, the Governors of Oregon and Washington, and county commissioners within the Scenic Area appointed 12 voting members to the Commission.

The Gorge Act sets forth use and development standards for land within SMAs and GMAs. 16 U.S.C. §§ 544(a), 544d(d)(1)-(9). The Commission, with the Secretary, must then integrate these standards into a Special Area Management Plan ("Plan"). In crafting the Plan, the Secretary is to develop interim guidelines to ensure that the Area's lands are regulated consistently with the Act. 16 U.S.C. § 544f(f). The Forest Service promulgated such guidelines after public involvement and consultation with the Area counties and other agencies. On June 30, 1987, the Secretary issued Final Interim Guidelines ("FIGs").

These FIGs are to stay in effect until the Area counties adopt land use ordinances consistent with the Plan as mandated by the Gorge Act. 16 U.S.C. § 544h(a)(1). The Secretary and Commission must review and approve these ordinances for compliance with the Plan and the Act. If a county's ordinances fail to receive approval or if a county refuses to adopt such ordinances, the Commission enacts ordinances for the county consistent with the Plan. 16 U.S.C. § 544e(b)(1).

During the interim period, the Secretary determines the standards for granting land use proposals. 16 U.S.C. § 544f(f). From the date of the Act's enactment through January 1, 1988, the Secretary, acting through the United States Forest Service, reviewed landowners' use proposals in the Scenic Area. Since January 1, 1988, the Commission has reviewed Scenic Area land use proposals that involve major development action or new residential development. The Commission's primary responsibility under the Act is to review all Area land use proposals that involve major development action or new residential development until the Plan is in place. The Secretary, acting through the United States Forest Service, reviews the balance of Area land use proposals. The Secretary also is authorized to acquire lands within the SMAs.

The individual plaintiffs submitted proposals which were denied by the Commission's Executive Director. The individual plaintiffs had not used their land to grow forest products or to produce farm commodities, but the Commission considered plaintiffs' property as either agricultural or forest land. Although residential development is a permitted use for plaintiffs' lands under applicable county zoning ordinances, the Commission denied

the proposals because they sought to convert agricultural or forest lands to rural residential land, in contravention of the Act.

Plaintiffs Barbara Lee Hayes, Charles Kyer, Marilyn McCall, Twila Rothrock, Keith Johnson, and Norris Johnson own land within an SMA. Plaintiff Willard Gaul owns land within an SMA and had his land use proposal to construct a residence denied by the Forest Service. The Forest Service sent an opinion letter to Gaul advising him that the development he proposed was inconsistent with the purposes of the Act.

Plaintiffs Richard Miller and Roberta Miller own land within an GMA. Plaintiffs Jack Kapp, David Kapp, Shirley Azure, Johnny Olson, Russell Pollard, LaDonna Pollard, Richard Templin, Ellen Templin, and Frank Windust own land within GMAs and had their respective residential development land use proposals denied by the Commission Executive Director ("Director"). Plaintiff Cynthia Williams owns land within an GMA and had her land use proposal approved by the Director. The Director eventually approved the Pollards' resubmitted application with conditions.

The Commission heard appeals from plaintiffs whose proposals had been denied by the Director. At these hearings, the Commission voted to affirm the Director's denials of plaintiffs' development proposals, except in the Windust's case, in which the Commission reversed. When the Commission affirmed the Director's decisions, the Commission voted unanimously to affirm in all but two instances. The Commission voted 9-1 to affirm the Director's decision to deny Templin's development proposal

and 6-5 to affirm the Director's decision to deny the Pollards' development proposal.

At these contested case hearings, the Director defended the position taken in his order, pursuant to a rule adopted by the Commission on November 14, 1988. At three hearings, an Oregon Assistant Attorney General was present as legal counsel for the Commission.

The Act entitles land owners whose development proposals were denied by the Commission to appeal to state court. 16 U.S.C § 544m. Plaintiffs have not sought review of the Commission's decisions to deny their proposal in state court. The United States has not purchased or condemned any of plaintiffs' land.

The Act provides that individuals who use or seek to use their lands in a manner inconsistent with the Act may be subject to civil penalties or to having the government acquire their land. 16 U.S.C. § 544m(a)(3).

Columbia Gorge United Organization—Protecting People and Property ("CGU") is a nonprofit corporation whose members primarily are private landowners in Area counties. The corporate purpose of CGU is "to organize a united effort to oppose federal control of the Columbia Gorge." Stipulation no. 13. CGU bylaws mandate that each CGU Board Director be an owner of residential property within the Area. Several, but not all, of the plaintiffs are CGU members. CGU does not own any land within the Area.

Friends of the Columbia Gorge ("Friends"), an organization "which was a moving force in initiating and obtaining passage" of the Gorge Act, has intervened in

this action as of right. Stipulation no. 24. Its members do not participate in determining the policy of the organization other than to confirm prospective Board members.

Director Richard Benner, Chairperson Stafford Hansell, and Commission members Don Clark, Dave Cannard, and Barbara Bailey are former Friends members. Three Commission members served on the Friends Board, two are Friends founders, one has a spouse who was a member, and one has a spouse who served on the Board until January 1989 and who still is a member. Cannard contributed to Friends in addition to paying annual dues and made an interest-free loan to Friends in the amount of approximately $11,000 in 1986. Friends paid the loan back on November 10, 1988.

All Commission members have resigned from Friends as of October 1988. Members Clark, Cannard, Hansell, and Bailey resigned their memberships after a motion was filed with the Commission on September 26, 1988 to disqualify them from presiding at quasi-judicial hearings in which Friends had participated as an interested party. These same four members did not announce their connection with Friends or withdraw from serving on appeals to the Commission from the Director's denials of four of plaintiffs' development proposals.

The Pacific Legal Foundation ("PLF") and the National Inholders' Association ("NIA") are amici curiae, in support of plaintiffs' position.

Plaintiffs seek a declaration that the Gorge Act, the Compact, and various regulations and guidelines promulgated under the Act and the Compact violate the United

States, Oregon, and/or Washington Constitutions. Plaintiffs also seek an injunction prohibiting implementation and administration of the Gorge Act and the Compact, all of which the Commission acted under in ruling on the proposals.

DISCUSSION

A. STANDING

Before the court considers the merits of a constitutional claim, the plaintiffs must demonstrate that they have standing as required by Article III of the United States Constitution. *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1981). "At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Id.* at 472 (omitting quotes). To demonstrate standing the plaintiffs must establish that: 1) a personal injury exists or is threatened, 2) the injury is fairly traceable to the challenged action and 3) the injury is likely to be redressed by a favorable decision. *Id.*

1. Injury or Threat of Injury Caused by the Gorge Act.

The individual plaintiffs own land in one of the three areas covered by the Act, and either the Director or the Commission has denied plaintiffs' requests for proposed uses of their property. The Commission denied plaintiffs' use of their land as they intended to use it, and they may

be forced to sell their property to the federal government. If the plaintiffs use their land inconsistently with the Act they are subject to civil penalties. 16 U.S.C. § 544m(a)(3). The plaintiffs, thus, have been injured or are threatened to be injured by the implementation of the Gorge Act.

Columbia Gorge United Organization--Protecting People and Property ("CGU") is a nonprofit corporation whose members primarily are private landowners in Area counties. A membership organization has standing as a representative of its members. *Warth v. Seldin,* 422 U.S. 490, 511 (1975). "The organization must allege that the members are suffering immediate or threatened injury as a result of the challenged action." *Id.* CGU bylaws mandate that each CGU Board Director own residential property within the Area. Several, but not all, of the individual plaintiffs/landowners are CGU members. CGU's members are directly affected by the Act and they individually have the potential to be injured or have been injured by the enforcement of the Act.

2. Relief

Plaintiffs request the court to declare the Act unconstitutional and enjoin the Commission from enforcing the Act. If the Act is declared unconstitutional then plaintiffs will be free to make use of their property in accordance with general state and local zoning laws. Residential development is permitted under the local zoning laws; thus plaintiffs could develop their land as they desired. Plaintiffs' requests for relief will redress their injuries, and thus they have standing to bring their claims.

3. Takings Claim

The defendants specifically assert that the plaintiffs' takings claim is not ripe for review. Plaintiffs assert that the Act took a scenic easement on their land without requiring just compensation. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 191 (1985).

The federal government has not taken any land. By the passage of the Act the United States is not vested with all rights, title, and interest in any land in the Gorge that is not already the property of the United States. *Cf.* Redwood National Park Act, 16 U.S.C. § 79c(b) (1968). The Gorge Act and the Compact permit the United States to take property only after a lengthy procedural process. 16 U.S.C. § 544e-h.

Before the Secretary can take lands in an SMA, by purchase or condemnation, the Commission must review the landowners development proposal and declare it inconsistent with the Act. 16 U.S.C. §544g(a)-(b). The land owner is entitled to appeal the Commission's decision to state court. The federal or state government may purchase the land or bring an action for condemnation. The land owner also can assert his rights in the United States Claims Court once the federal government has purchased or condemned the property. Tucker Act, 28 U.S.C. § 1491.

Plaintiffs have not exhausted their administrative or judicial remedies and have not received compensation for

land that the Commission declares inconsistent with the Act. *See Williamson County Planning Comm'n*, 473 U.S. at 194-195. I find that because the federal government has not denied plaintiffs just compensation, and the plaintiffs have not appealed to state court or used the process provided by the Tucker Act, 28 U.S.C. § 1491, their takings claims are not ripe for review.

B. VIOLATION OF THE TENTH AMENDMENT

Plaintiffs contend that when Congress enacted the Gorge Act, Congress exceeded its powers enumerated in the United States Constitution. The tenth amendment reserves powers to the states that are not delegated to the United States by the Constitution. U.S. Const. amend. X. Plaintiffs assert that the power to enact zoning laws is vested in the states and the municipalities and not in the federal government, and that local zoning is outside the scope of the congressional enumerated powers. Plaintiffs thus assert that the Gorge Act, the Final Interim Guidelines and the Compact impose zoning on private land and violate the tenth amendment.

1. The States' Powers

Plaintiffs imply that the Gorge Act completely usurps the states' right to enact zoning laws. Congress or the federal agencies, however, do not directly dictate the zoning laws to the private property owners. The Gorge Act establishes criteria and guidelines to advance Congress' goal to preserve and enhance the scenic, cultural, recreational and natural resources of the Gorge, 16 U.S.C.

§ 544d, and provides federal assistance in enforcing the Gorge Act. Oregon and Washington and the local governments primarily enforce the Gorge Act through the Plan and local ordinances.

When Oregon and Washington enacted the interstate compact, the states voluntarily agreed to the congressional standards. 16 U.S.C § 544o(d); ORS 390.415; Rev. Wash. Code § 43.97A. The governors of Oregon and Washington appoint members of the Commission. The Commission members adopt the final version of the management plan and the Commission rules on whether a private landowner's proposed use of land within GMAs and SMAs is consistent with the management plan. The counties enact zoning laws that are consistent with the management plan, the Compact, and the Gorge Act. If the counties do not adopt land use ordinances consistent with the Gorge Act the Commission will enact ordinances consistent with the Plan and the Compact. Oregon and Washington, who act through the Commission, and local governments continue to enforce the zoning laws.

The federal government has limited authority to regulate zoning and development in the Scenic Area. If the state or local governments do not enact ordinances consistent with the Gorge Act, the Secretary has only the authority to withhold funding granted to the states for development consistent with the Congress' goal of protecting the Scenic Area. 16 U.S.C. §§ 544i(b), 544n(c). Only during the interim period, the federal government determines the standards for which developmental proposals are consistent with the Gorge Act. 16 U.S.C. §§ 544h, 544m. Once the Compact was formed and the laws regarding the Gorge are enacted, the federal government

manages only land within the SMAs. 16 U.S.C. §§ 544f, 544g(a)(1). The United States can also obtain injunctive relief or withhold funding from violators of the Gorge Act. 16 U.S.C. §§ 544m(b)(5)(A) & 544n(C). Oregon and Washington continue to enact and regulate zoning laws. Congress has not usurped Oregon's and Washington's power to regulate private land use, but sets guidelines for the states to follow. Congress has not violated the tenth amendment.

2. Implied Congressional Powers

Plaintiffs then assert that constitutional powers, implied or direct, do not exist that authorize Congress to carry out the Gorge Act. Congress has implied powers which are necessary and proper to carry into effect its enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

a. Commerce Clause

Plaintiffs contend that the Gorge Act is beyond the scope of the commerce clause because residential land use is immobile and local, and thus does not affect interstate commerce.

Plaintiffs first assert that since Congress did not make any findings that zoning private land in the National Scenic Area was necessary to regulate interstate commerce, Congress cannot derive its power through the commerce clause. Congress, however, need not make specific findings in the Act. *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964). As in *Katzenbach*, while debating

the act at issue, Congress considered the impact the act would have on interstate commerce. *See* 132 Cong. Rec. H11121-22 (daily ed. Oct. 16, 1986) (statements of Reps. AuCoin and Wyden); 132 Cong. Rec. S15636 (daily ed. Oct. 8, 1989) (statements of Sen. Hatfield).

The Gorge Act is constitutional under the commerce clause if a rational basis exists for finding that the regulated activity affects interstate commerce and the means by which Congress regulates the activity are reasonably adapted to Congress' goal. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981). The activity that Congress regulates does not have to move through interstate commerce; it only has to affect interstate commerce. *Fry v. United States*, 421 U.S. 542, 547 (1975).

The legislative record supports a finding that the establishment of a national scenic area affects interstate commerce. First, by enacting the Gorge Act, which was adopted by an interstate compact between the states of Washington and Oregon, Congress intended to protect the scenic, cultural, recreational, and natural resources of the Gorge. People from all over the world come to Oregon and Washington to enjoy the beauty of the Gorge and use the rivers and mountains for recreation, including windsurfing, hiking, bicycle riding, and dining. *See* 132 Cong. Rec. S15637 (Oct. 8, 1986) (Senator Hatfield). Second, Congress intended to regulate the competing economic interest in the Scenic Area. 132 Cong. Rec. S15637-39 (Oct. 8, 1986) (testimony concerning the timber industry and protecting anadromous fisheries and the regional fishing economy). Finally, the Scenic Area includes two states bisected by a navigable waterway.

Rational basis clearly exists for finding that the establishment of the Scenic Area affects interstate commerce.

A nexus must exist between regulating the development of the Scenic Area and Congress' goal. *Hodel*, 452 U.S. at 276. Congress specified that the purpose of the Gorge Act is

> (1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational and natural resources of the Columbia River Gorge; and
>
> (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing further economic development . . .

16 U.S.C. § 544. Congress achieves its goals through the involvement of federal, state and local government instrumentalities in enforcing the Gorge Act. 16 U.S.C. § 544-544p (1987). To protect the Gorge and its economy, Congress has divided the Columbia Gorge into three management areas and the federal and state governments approve any development plans within the SMAs or GMAs. Local zoning laws continue to control property development in the Urban Area.

The SMAs have the most significant scenic and cultural values and have been subject to developmental pressure from private land owners. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 Envtl L. 863, 934 (1987). The SMAs are protected by Forest Service management, by the Forest Service's acquisition powers and by the Commission's authority to disapprove of any development. GMAs

include land that need protection but the protection is not as crucially important as the lands within the SMAs. *Id.* The protection is achieved through the Commission's approval of property development. The exemption of the UAs plan enhances the economy of the cities and towns within the Scenic Area.

The complex management plan, which includes studies of the Gorge and resource inventory, land use designation and adoption of a comprehensive plan by the state and local authorities creates more than a reasonable nexus to achieving Congress' goals. Congress acted within the scope of its constitutional power through the commerce clause when it enacted the Gorge Act.

b. Property Clause

Plaintiffs next contend that the management plan violates the property clause. The property clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress may regulate privately and state owned lands if the regulations are necessary to protect the federal lands and navigable waters. *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976)(citing *Camfield v. United States*, 167 U.S. 518, 525-26 (1897)); *United States v. Alford*, 274 U.S. 264, 267 (1927); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979).

Plaintiffs contend that because the federal government owns only 17% of the total Scenic Area it does not own enough land to establish a rational basis for zoning non-federal land. Plaintiffs' argument is faulty. First, the

federal government does not exclusively zone the Scenic Area but the states and local governments enact zoning laws that are consistent with the Gorge Act. Second, the federal government primarily regulates the SMAs and the United States owns a substantial amount[2] of the land in the SMAs.

The Forest Service has the authority to manage the land within the SMAs, to acquire property within the SMAs, and the Secretary has the authority to obtain injunctive relief or other relief from violators of the Gorge Act if state or local government instrumentalities do not act consistently with the Gorge Act. 16 U.S.C. §§§ 544g(a)(1), m(b)(1), m(b)(5)(A). As I found above, the Gorge Act, through the Forest Service and the Secretary, protect the land within the Scenic Area—federal, state and private land--from threats to the natural, scenic beauty, and the natural resources. The Forest Service or Congress has not acted beyond the scope of the property clause.

c. The Compact Clause

Plaintiffs next contend that Congress "bootstrapped" its legislative authority for the Gorge Act with the compact clause. Congress must consent to a compact between two states when the activity in the compact affects the federal sphere, U.S. Const. art. I, §10, cl. 3, but Congress cannot confer its powers through the compact clause. *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d

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[2] The federal government owns 42,102 acres out of 112,328 acres of land in the SMA.

1359, 1374 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). Since I have found that Congress had authority to enact the Gorge Act through the commerce clause and through the property clause, plaintiffs' argument that defendants bootstrapped their authority to enact the Gorge Act through the compact clause does not have any merit.

The Pacific Legal Foundation ("PLF"), Amicus Curiae, additionally argues that the Compact is not valid because Congress coerced Oregon and Washington into approving the compact. PLF contends that the states did not take part in formulating the Compact and Congress created a detailed scheme that the state had no choice but to accept. Thus, PLF argues that the Compact is unconstitutional.

Congress can consent to a compact prior to the states agreeing to the compact, *id.* at 1364, and can specify conditions precedent to congressional consent. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-282 (1959). The Compact, here, is similar to the compact in *Seattle Master Builders*, where four states adopted a compact to create an interstate council. 786 F.2d at 1374. In *Seattle Master Builders*, Congress specified the provisions for the creation and the operation of an interstate council. *Seattle Master Builders*, 786 F.2d at 1372; *see* 16 U.S.C. § 839b. The congressional act required the council to prepare a regional conservation plan which conformed to a list of federal standards. *Id.* The Ninth Circuit held the Compact valid. *Id.*

Similarly, the Gorge Act sets forth specific requirements that the commission must follow prior to Congress

consenting to the Compact. For example, the states' land use ordinance must be consistent with the enumerated use and development standards for land within SMAs and GMAs set forth in the Gorge Act. 16 U.S.C. §§ 544d(d)(1)-(9). The states also must create a commission and the Commission, in cooperation with the Secretary, must then integrate these standards into a Scenic Area Management Plan. However, the Act did not require Oregon and Washington to enact the Compact. The states were free to reject the conditions of the Compact. Instead Oregon and Washington established a Commission and agreed to a compact which incorporated the terms of the Gorge Act. The states were not coerced into agreeing to the Compact. The Compact is valid.

d. Constitutional Amendment

Plaintiffs argue that the Gorge Act and the Compact amend the United States Constitution. Congress had the power to enact the Gorge Act through the commerce clause and the property clause and Congress properly exercised its right to consent to a valid compact. Therefore, Congress has not amended the Constitution by enacting the Gorge Act.

C. DENIAL OF STATES' RIGHTS

Plaintiffs' arguments that the Gorge Act usurps the democratic process and the plaintiffs' electors' right to franchise are without merit. Plaintiffs contend that their electors were denied the right to approve or reject, by vote, the local government apparatus and the right to

initiate and refer for a county vote local land use ordinances. The states, through their democratic process and their electors, agreed to the Compact, created the Commission and were authorized to enact zoning laws. 16 U.S.C. §§ 544c(a)(1)(A) & (B) and 544e(b)2, f(h)(2). The states also have not been denied the right to participate in the national political process and have not been singled out. *See Garcia v. San Antonio Metro Transit*, 469 U.S. 528, 555 (1985); *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). Congress did not violate the tenth amendment or deny plaintiffs' electors equal protection.

D. DENIAL OF DUE PROCESS

1. Procedural Due Process

Plaintiffs further assert that the Gorge Act, the Final Interim Guidelines and the Compact do not provide landowners with prior notice, a hearing or a forum to contest the National Scenic Area Management Plan. They claim that defendants are limited to quasi-judicial reviews of land use proposals. Plaintiffs' claim is without merit and is not ripe for review.

First, the Act provides for public comment and participation. The Gorge Act states that "the Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances." 16 U.S.C. § 544d(e). In addition, the Gorge Act and the Compact provide for judicial review of any final actions of a county, of the Commission, or of the Secretary, which relates to the implementation of the Act

and of any land use ordinance or interim guideline adopted under the Act. *Id.*; 16 U.S.C. § 544m(b)(4). Further, the Commission's Plan is not in final form and the public will be entitled to additional notice and comment. Plaintiffs have not been denied any procedural due process of the law.

2. Substantive Due Process

Plaintiffs next argue that the Gorge Act is unconstitutionally vague as applied to the development of privately owned land within the Scenic Area but outside the Urban Area. The Act prohibits residential developments outside the Urban Area that "adversely affect" the scenic, cultural, recreational, and natural resources of the National Scenic Area. 16 U.S.C. § 544d(d)(8). Plaintiffs contend that "adversely affect" is ambiguous and the defendants must speculate as to the Act's application.

A statute is void for vagueness if its terms are not described with sufficient definiteness so that ordinary people can understand what conduct is prohibited, and if it is understood in a manner that encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The term "adversely affect" in itself is understandable when read in the context of the Gorge Act. It means development that will harm the scenic beauty or natural resources of the Scenic Area. The Gorge Act also applies other standards for determining if the land development will adversely affect the Gorge. *See* 16 U.S.C. §§ 544(a), 544d(j), 544(l) and 544d(d). For example, section 544(a) defines adversely affects as "a reasonable likelihood of more than moderate adverse

consequences for the scenic, cultural, recreation or natural resources of the scenic area . . . " The Secretary has also developed interim guidelines and the Commission has enacted administrative rules. The term "adversely affect" is clearly defined and the plaintiffs have not been denied substantive due process.

3. Administrative Due Process

a. Bias

Plaintiffs also contend that the court should enjoin Commission members who have been members of Friends of the Columbia Gorge from participating in quasi-judicial hearings because due process requires impartial decision making. The defendants assert that none of the Commission members are currently members of the Friends of Columbia River and the Board is not biased.

Due process requires an impartial decision-maker, even if the adjudication is administrative and informal. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Plaintiffs have the burden to prove that the decision-makers partially decided the case, which is shown through a financial or personal stake. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702-3 (1948). It is not a denial of due process for a judge or an administrative law judge to decide a case after the judge expressed an opinion on the issue in a case. *Id.* In *Cement*, the Court found that the plaintiff was not denied procedural due process when the ALJ had testified at a congressional hearing that was contrary to the plaintiffs' positions.

Here, plaintiffs allege primarily that the Commission members are biased because they were members of Friends of the Columbia River. One board member, Dave Cannard, made a loan to Friends which Friends paid back on November 10, 1988. The loan does not create a financial interest in the plaintiffs' appeals to the Commission. Plaintiffs have not demonstrated any financial or personal stake the Commission members have in the outcome of the case and the Commission members' are not biased just because they may have personal views. *See id.*

b. Washington's Statutory Disqualifications of a Judge

Plaintiffs also contend that Washington's "appearance of fairness rule" applies and that the members' association with the FCG violates this statute. *See* RCW 42.36.060. The statute, however, applies only to ex parte contact, which did not occur here.

The Washington conflict of interest statute, which applies here, disqualifies a judge from decision making when the judge has a pecuniary interest. RCW 42.18.160. Agency personnel are not disqualified for having formed opinions regarding matters at issue. The Commission members are not biased either under the United States Constitution or Washington's laws.

c. Exclusion of the Director from Contested Appeals

Plaintiffs next request the court to enjoin the Executive Director from involvement in contested appeals on

developmental proposals because he performs three different roles: judge, witness and attorney. Plaintiffs argue that Oregon Revised Statute 183.450(8) prohibits the executive director from giving legal arguments and giving legal advice to the Commission. An agency member may represent the agency if the agency and the attorney general give the director permission. ORS 183.450(9). If permission is not given the party claiming that the ruling should be reversed must demonstrate that the agency member was prejudiced. *Id.* On November 14, 1988, the Commission permitted the executive director to represent the Commission, and on October 28, 1988, the Oregon Attorney General permitted the executive director to represent the Commission.

Some of the plaintiffs' appeals occurred prior to permission being granted by the Attorney General. The plaintiffs, however, have not shown that the Director substantially prejudiced their cases as required by the statute. *See* ORS 183.450(9). Since the Commission and the Attorney General ratified the executive director's appearance after the plaintiffs' appeals, I find that the plaintiffs' decision should not be reversed and the commission is not enjoined from having the executive director represent it.

E. VIOLATION OF THE APPOINTMENTS CLAUSE

Even though plaintiffs have argued that their constitutional rights have been violated because zoning is a state or local issue and state administrative statutes should apply, plaintiffs argue that the Gorge Act violates the appointments clause. U.S. Const. art. II, § 2, cl. 2.

Plaintiffs assert that the Commission is a federal agency and the President of the United States should appoint the members of the Commission. Plaintiffs further assert that the Commission is a federal agency because the Commission administers and enforces the Gorge Act on private land owners.

Similar to the case at bar, in *Seattle Master Builders*, 798 F.2d at 1359, the petitioners argued that if the council is a valid compact agency, the appointments clause requires the members to be appointed by the President of the United States and not the governors of the states. The Ninth Circuit disagreed, stating that "[t]he appointments clause is addressed to the separation of powers between the President and Congress. No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the state." *Seattle Master Builders*, 786 F.2d at 1365.

The appointments clause applies to: 1) all executive officers; 2) who serve pursuant to federal law; 3) and who serve with significant authority over federal governmental actions. Oregon and Washington enacted laws pursuant to the Gorge Act and the Commission enforces the laws pursuant to the Compact and the states' laws. "As with any compact, congressional consent did not result in the creation of the compact but only authorized the creation of the compact organization and the appointment of its officials. The appointment, salaries and direction of the Council members are state derived." *Id.* at 1365. As in *Seattle Master Builders*, I need not reach the first and third element because the plaintiffs did not prove the second element. I find that the commission acts

pursuant to Oregon and Washington laws; therefore, the compact did not violate the appointments clause.

Plaintiffs also contend that since the Commission is a federal and not a state agency, the defendants should be acting pursuant to federal law and that the landowners are denied due process and equal protection of the law. They assert that the landowners in the GMA are denied access to the federal court on appeal of the Commission's denial of a proposal. As I have found that the commission is a state agency and acts pursuant to state law, the plaintiffs are not entitled to a review of the Commission's decisions in federal court. Further, there is no requirement that federal court have jurisdiction "so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

The judicial review which the Gorge Act sets forth satisfies due process. The Gorge Act and the Compact specify that jurisdiction over appeals or challenges to Commission or county action be placed in state courts, while providing jurisdiction to review action taken by the Secretary in federal district court. 16 U.S.C. § 544m(b)(4)-(6). Congress has the power to define and limit the jurisdiction of federal courts. *Lauf v. E.G. Skinner & Co.*, 303 U.S. 323, 330 (1938). Since all challenges to the Commission or county actions are pursuant to state law and the Secretary's actions are pursuant to federal law, a rational basis exists for judicial review in state court for an appeal from the Commission and rational basis exists for judicial review in federal court for review of the Secretary's actions. Plaintiffs have not been denied due process of the law.

F. ADMINISTRATIVE RULE 350-20-002(12) and 350-20-004(2)

Lastly, plaintiffs allege that the Commission should be enjoined from using administrative rule 350-20-002(12) and 350-20-004(2) because the Commission unlawfully amended the Final Interim Guidelines. The Commission expanded the definition of residential development to include "any alteration to the exterior deemed significant to the Commission or its designee." Adm. Rule 350-20-002-(12). The Commission also amended the FIGs' definitions of agricultural land to include land suitable for production of farm commodities, Amd. Rule 350-20-004 (2)(a), and farm land to include land capable of producing in excess of twenty cubic feet per acre per year of merchantable tree species. Adm. Rule 350-20-004(2)(b).

Plaintiffs allege that until the management plan is in effect the FIGs apply to any proposed development outside the Urban Area. The Gorge Act authorizes the Commission only to develop guidelines for inclusion in the management plan to be adopted by the counties in the Scenic Area and the Commission acted without authority when it amended the definitions enumerated above.

Defendants contend that Section 544h(c) gives the Commission authority to amend the FIGs during the interim period. Section 544h(c) provides that during the interim period

> [t]he Commission shall review all proposals for major development actions and new residential development in such county in the scenic area, except urban area. The commission shall allow

> major development actions and new residential development only if it determines that such development is consistent with the standards contained in section 554d of this title and the purposes of sections 544 to 544p.

16 U.S.C. § 544h(c). This Section is ambiguous as to whether the Commission must follow the FIGs exactly. Section 544h(c) only states that the Commission must find that the development is not consistent with the standards set forth in the Gorge Act.

The defendant/Commission correctly states that the proper question here is whether the rules are consistent with the Gorge Act itself. Wide discretion is given to administrative agencies when they interpret the law. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The court must determine if the Commission abused its discretion and whether the adopted rules are unreasonable and inconsistent with the Act. *Id.* at 843.

The Commission's definition of residential development does not expand Congress's definition. "Alteration to the exterior" is only a more detailed and clearer definition of "construction of any residence or other related major structure." I find that the Commission's definition is consistent with the Gorge Act.

The Commission definition of agricultural land is no different than Congress'. *See* 16 U.S.C. § 544d(b)(2). Finally I find that the definition of farm land is not inconsistent or unreasonable because the Commission clarified the definition of farm land. Considering that much of the land in the Columbia Gorge contains forest

products, it is necessary to set clear standards for determining when land is capable of being used as a farm product. I find that the Commission did not abuse its discretion by setting forth more detailed definitions of the developments restricted by the Gorge Act.

CONCLUSION

I find that the plaintiffs did not have standing to assert a takings claim and that the Columbia River Gorge Scenic Act and the Compact are constitutional. Congress, the Commission, and the counties acted within the authority of the United States Constitution, the law of the United States and the Oregon and Washington Constitutions and laws. Plaintiffs are denied declaratory and injunctive relief.

DATED this 23 day of May 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States
District Court Judge

APPENDIX C

United States Constitution, Article I

Section 10, Clause 3. Duty on Tonnage, State Compacts, War

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Article II

Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

United States Constitution, Article IV

Section 3, Clause 2. Public Lands

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. Republican Government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government; and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

United States Constitution

AMENDMENT X—RESERVED POWER TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

16 U.S.C.

§ 544. Columbia River Gorge National Scenic Area: definitions

As used in sections 544 to 544p of this title, the term—

(a) "adversely affect" or "adversely affecting" means, except as used in section 544m of this title, a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on—

(1) the context of a proposed action;

(2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

(3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

(4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant affects to an insignificant level;

(b) "agricultural lands" means lands designated as agricultural lands pursuant to section 544d of this title;

(c) "Commission" means the Columbia River Gorge Commission established pursuant to section 544c of this title;

(d) "counties" means Hood River, Multnomah, and Wasco Counties, Oregon; and Clark, Klickitat, and Skamania Counties, Washington;

(e) "Dodson/Warrendale Special Purchase Unit" means the Dodson/Warrendale Special Purchase Unit established pursuant to section 544b of this title;

(f) "forest lands" means lands designated as forest lands pursuant to section 544d of this title;

(g) "Indian tribes" means the Nez Perce Tribe, the Confederated Tribes and Rands of the Yakima Indian Nation, the Confederated Tribes of the Warm Springs of Oregon, and the Confederated Tribes of the Umatilla Indian Reservation;

(h) "interim guidelines" means any interim guidelines developed by the Secretary pursuant to section 544h of this title, and any amendment, revision, or variance;

(i) "land use ordinance" or "ordinance" means any ordinance adopted by a county or by the Commission pursuant to sections 544 to 544p of this title, and includes any amendment to, revision of, or variance from such ordinance;

(j) "major development actions" means any of the following:

(1) subdivisions, partitions and short plat proposals;

(2) any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

(3) the exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the special management areas used for the production of forest products; and

(4) permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size;

(k) "management plan" means the scenic area management plan adopted pursuant to section 544d of this title;

(l) "open spaces" means unimproved lands not designated as agricultural lands or forest lands pursuant to section 544d of this title and designated as open space pursuant to section 544d of this title. Open spaces include—

(1) scenic, cultural, and historic areas;

(2) fish and wildlife habitat;

(3) lands which support plant species that are endemic to the scenic area or which are listed as rare, threatened or endangered species pursuant to State or Federal Endangered Species Acts;

(4) ecologically and scientifically significant natural areas;

(5) outstanding scenic views and sites;

(6) water areas and wetlands;

(7) archaeological sites, Indian burial grounds and village sites, historic trails and roads and other areas which are culturally or historically significant;

(8) potential and existing recreation resources; and

(9) Federal and State wild, scenic, and recreation waterways;

(m) "recreation assessment" means the recreation assessment adopted pursuant to section 544d of this title;

(n) "residential development" means the permitting for siting or construction of any residence or other related major structure;

(o) "scenic area" means the Columbia River Gorge National Scenic Area established pursuant to section 544b of this title;

(p) "Secretary" means the Secretary of Agriculture;

(q) "special management areas" means areas within the scenic area established pursuant to section 544b of this title;

(r) "States" means the States of Oregon and Washington; and

(s) "urban areas" means those areas within the scenic area identified as urban areas on the map referred to in section 544b(e) of this title or within the boundaries of an urban area as revised pursuant to section 544b(f) of this title.

(Pub.L. 99-663, § 2, Nov. 17, 1986, 100 Stat. 4274.)

§ 544a. Purposes

The purposes of sections 544 to 544p of this title are—

(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

(Pub.L. 99-663, § 3, Nov. 17, 1986, 100 Stat. 4276.)

§ 544b. Establishment of scenic area

(a) Boundaries

(1) There is hereby established the Columbia River Gorge National Scenic Area.

(2) The Boundaries of the scenic area shall be generally depicted on the map entitled "Boundary Map, Columbia River Gorge National Scenic Area," numbered NSA-001 sheets 1 and 2, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(b) Special Management Areas

(1) The following areas within the boundaries of the scenic area are hereby designated "Special Management

Areas": Gates of the Columbia River Gorge; Wind Mountain; Burdoin Mountain; and Rowena.

(2) The boundaries of the special management areas designated in this section—

(A) shall be generally depicted on the map entitled "Special Management Areas, Columbia River Gorge National Scenic Area", numbered SMA-002 sheets 1 through 17, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service; and

(B) shall include all islands within the boundaries of the scenic area.

(c) Revision of Special Management Area boundaries

The Secretary, in consultation with the Commission, may make minor revisions in the boundaries of special management areas after publication of notice to that effect in the Federal Register and submission of notice thereof to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives. Such notice shall be published and submitted at least sixty days before the revision is made. Notice of final action regarding such revision shall also be published in the Federal Register.

(d) Dodson/Warrendale Special Purchase Unit

(1) There is hereby established the Dodson/Warrendale Special Purchase Unit.

(2) The boundaries of the Dodson/Warrendale Special Purchase Unit shall be generally depicted on the map entitled "Dodson/Warrendale Special Purchase Unit, Columbia River Gorge National Scenic Area", numbered SPU-003 sheet 1, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(e) Urban Areas

(1) The following cities and towns are hereby designated as "Urban Areas": Cascade Locks, Hood River, Mosier, and The Dalles, Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram, Washington.

(2) The boundaries of urban areas shall be generally depicted on the map entitled, "Urban Areas, Columbia River Gorge National Scenic Area", numbered UA-004 sheets 1 through 11, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service. The boundaries of urban areas designated in this subsection may be revised pursuant to the provisions of this section.

(f) Revision of Urban Area boundaries

(1) Upon application of a county and in consultation with the Secretary, the Commission may make minor revisions to the boundaries of any urban area identified in subsection 4(e) of this section. A majority vote of two-thirds of the members of the Commission, including a

majority of the members appointed from each State, shall be required to approve any revision of urban area boundaries.

(2) The Commission may revise the boundaries of an urban area only if it finds that—

(A) a demonstrable need exists to accommodate long-range urban population growth requirements or economic needs consistent with the management plan;

(B) revision of urban area boundaries would be consistent with the standards established in section 544d of this title and the purposes of section 544 to 544p of this title;

(C) revision of urban area boundaries would result in maximum efficiency of land uses within and on the fringe of existing urban areas; and

(D) revision of urban area boundaries would not result in the significant reduction of agricultural lands, forest lands, or open spaces.

(Pub.L. 99-663, § 4, Nov. 17, 1986, 100 Stat. 4276.)

§ 544c. Columbia River Gorge Commission

(a) Establishment and membership of Commission

(1) To achieve the purposes of sections 544 to 544p of this title and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in sections 544 to 544p of this title pursuant to which, within one year after November 17, 1986—

(A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, and shall incorporate sections 544 to 544p of this title by specific reference in such agreement. The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement and of sections 544 to 544p of this title and shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law;

(B) the States of Oregon and Washington shall provide to the Commission, State agencies, and the counties under State law the authority to carry out their respective functions and responsibilities in accordance with the provisions of paragraph (1)(A) of this subsection; and

(C) the States of Oregon and Washington shall appoint members of the Commission as provided in clauses (i) through (iii), subject to applicable State law: *Provided*, That the Governor of either State may extend the time for appointment of Commission members ninety days to provide more time for the States and counties to make such appointments. Membership of the Commission shall be as follows:

(i) six members, comprised of one resident from each of the following counties: Hood River, Multnomah, and Wasco Counties, Oregon, and Clark, Klickitat, and Skamania Counties, Washington, to be appointed by the governing body of each of the respective counties: *Provided*, That in the event the governing body of a county fails to make such appointment, the Governor of

the State in which the county is located shall appoint such member;

(ii) three members who reside in the State of Oregon, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Oregon;

(iii) three members who reside in the State of Washington, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Washington; and

(iv) one ex officio, nonvoting member who shall be an employee of the Forest Service, to be appointed by the Secretary.

(2) The agreement shall take effect and the Commission may exercise its authorities pursuant to the agreement upon the appointment of four initial members from each State, subject to applicable State law, and the date of such an agreement shall be the date of establishment of the Commission. Such agreement is hereby consented to by the Congress.

(3) Either State or any county may fill any vacancy occurring prior to the expiration of the term of any member originally appointed by the State or county. Each member appointed to the Commission shall serve a term of four years, except that, with respect to members initially appointed pursuant to paragraph (1)(C)(i), each Governor shall designate one member to serve for a term of five years and one to serve for a term of six years, and one member from each State initially appointed pursuant to paragraph (1)(C)(ii) and (iii) shall be designated by the Governor to serve a term of five years, and one to serve a term of six years. Neither the Governors nor the governing bodies of any of the counties may appoint Federal,

State, or local elected or appointed officials to the Commission.

(4) a majority of the members of the Commission shall constitute a quorum. The members of the commission shall select from among themselves a Chairman by majority vote of the members appointed from each State.

(5) Except for the ex-officio member appointed pursuant to paragraph (1)(c)(iv), the members and officers and employees of the Commission shall not be officers or employees of the United States for any purpose. The Commission shall appoint, fix compensation for, and assign and delegate duties to such officers and employees as the Commission deems necessary to fulfill its functions under sections 544 to 544p of this title. The compensation of Commission members shall be fixed by State law. The compensation of Commission members, officers, and employees and the expenses of the Commission shall be paid from funds provided to the Commission by the States.

(b) Applicable law

For the purposes of providing a uniform system of laws, which in addition to sections 544 to 544p of this title, are applicable to the Commission, the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State. Regulations applicable to financial disclosure under this subsection shall be applied to members of the

Commission without regard to the duration of their service on the Commission or the amount of compensation received for such service. No contract, obligation, or other action of the Commission shall be an obligation of the United States or an obligation secured by the full faith and credit of the United States.

(c) Assistance to Commission

Upon the request of the Commission, the Secretary and other Federal agencies are authorized to provide information, personnel, property, and services on a reimbursable basis, and the Secretary is authorized to provide technical assistance on a nonreimbursable basis, to the Commission to assist it in carrying out its functions and responsibilities pursuant to sections 544 to 544p of this title.

(d) Advisory committees

The Commission shall establish voluntary technical and citizen advisory committees to assist the Commission in carrying out its functions and responsibilities pursuant to sections 544 to 544p of this title.

(Pub.L. 99-663, § 5, Nov. 17, 1986, 100 Stat. 4277.)

§ 544d. Scenic area management plan

(a) Studies

Within one year after the date the Commission is established, it shall, in cooperation with the Secretary,

complete the following studies for use in preparing the management plan:

(1) Resource inventory

The Commission shall complete a resource inventory. The resource inventory shall—

(A) document all existing land uses, natural features and limitations, scenic, natural, cultural, archaeological and recreation and economic resources and activities: *Provided*, That the location of any Indian burial grounds, village sites, and other areas of archaeological or religious significance shall not be made public information and such information shall be used for administrative purposes only; and

(B) incorporate without change the resource inventory developed by the Secretary pursuant to section 544f of this title for the special management areas.

(2) Economic opportunity study

The Commission shall complete a study to identify opportunities to enhance the economies of communities in the scenic area in a manner consistent with the purposes of sections 544 to 544p of this title.

(3) Recreation assessment

The Commission shall complete an assessment of recreation resources and opportunities for enhancement of these resources. The recreation assessment shall—

(A) designate the location and specify the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(B) identify areas within the scenic area that are suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities and river access areas; and

(C) subject to the treaty and other rights of Indian tribes, designate areas to provide increased access for recreation purposes to the Columbia River and its tributaries; and

(D) incorporate without change the recreation assessment developed by the Secretary pursuant to section 544f of this title for the special management areas.

(b) Land use designations

Within two years after the Commission is established, it shall develop land use designations for the use of non-Federal lands within the scenic area. The land use designations shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(l) of this section, and consistent with the standards established in subsection (d) of this section;

(2) designate those lands used or suitable for the production of crops, fruits or other agricultural products or the sustenance of livestock as agricultural lands;

(3) designate lands used or suitable for the production of forest products as forest lands;

(4) designate lands suitable for the protection and enhancement of open spaces;

(5) designate areas in the scenic area outside special management areas used or suitable for commercial development: *Provided,* That such designation shall encourage, but not require, commercial development to take place in urban areas and shall take into account the physical characteristics of the areas in question and their geographic proximity to transportation, commercial, and industrial facilities and other amenities;

(6) designate areas used or suitable for residential development, taking into account the physical characteristics of the areas in question and their geographic proximity to transportation and commercial facilities and other amenities; and

(7) incorporate without change the designation of urban areas established in section 544b(e) of this title.

(c) Adoption of management plan

Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area. The Commission shall adopt the management plan by a majority vote of the members appointed,

including at least three members from each State. The management plan shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(l) of this section;

(2) include land use designations developed pursuant to subsection (b) of this section;

(3) be consistent with the standards established in subsection (d) of this section;

(4) incorporate without change the management direction for the use of Federal lands within and the land use designations for the special management areas adopted by the Secretary pursuant to section 544f of this title; and

(5) include guidelines for the adoption of land use ordinances for lands within the scenic area. The guidelines—

(A) shall incorporate without change the guidelines for the development of special management area land use ordinances developed by the Secretary pursuant to section 544f of this title; and

(B) shall not apply to urban areas designated in section 544b(e) of this title.

(d) Standards for management plan

The management plan and all land use ordinances and interim guidelines adopted pursuant to sections 544 to 544p of this title shall include provisions to—

(1) protect and enhance agricultural lands for agricultural uses and to allow, but not

require, conversion of agricultural lands to open space, recreation development or forest lands;

(2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces;

(3) protect and enhance open spaces;

(4) protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the recreation assessment adopted pursuant to subsection (a) of this section;

(5) prohibit major development actions in special management areas, except for partitions or short plats which the Secretary determines are desirable to facilitate land acquisitions pursuant to sections 544 to 544p of this title;

(6) prohibit industrial development in the scenic area outside urban areas;

(7) require that commercial development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(8) require that residential development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(9) require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

(e) Agency consultation and public involvement

The Secretary and the Commission shall exercise their responsibilities pursuant to sections 544 to 544p of this title in consultation with Federal, State, and local governments having jurisdiction within the scenic area or expertise pertaining to its administration and with Indian tribes. The Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances. The Commission and the appropriate county shall promptly notify the Secretary, the States, local governments and Indian tribes of all proposed major development actions and residential development in the scenic area.

(f) Concurrence of management plan

(1) Review by Secretary

Upon adoption of the management plan, the Commission shall promptly submit the plan to the Secretary for review. If the Secretary agrees with the Commission that the management plan is consistent with the standards established in this section and the purposes of sections 544 to 544p of this title, the Secretary shall concur to that effect. Should the Secretary fail to act on the proposed plan within ninety days, the Secretary shall be deemed to have concurred on the management plan.

(2) Denial of concurrence

If concurrence is denied, the Secretary shall state the reasons for finding the plan is inconsistent with the standards established in this section or the purposes of sections 544 to 544p of this title, and shall submit to the Commission suggested modifications to the management plan to make it consistent with such standards and the purposes of sections 544 to 544p of this title.

(3) Commission reconsideration

Within one hundred and twenty days after receipt of notification of non-concurrence, the Commission shall—

(A) revise and resubmit the plan to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a management plan consistent with the provisions of this section and the purposes of sections 544 to 544p of this title.

(g) Revision of plan

No sooner than five years after adoption of the management plan, but at least every ten years, the Commission shall review, the management plan to determine whether it should be revised. The Commission shall submit any revised management plan to the Secretary for review and concurrence, in accordance with the provisions of this section for adoption of the management plan.

(h) Amendment of plan

If the Commission determines at any time that conditions within the scenic area have significantly changed, it may amend the management plan. The Commission shall submit amendments to the management plan to the Secretary for review, in accordance with the provisions of this section for adoption of the management plan.

(Pub.L. 99-663, § 6, Nov. 17, 1986, 100 Stat. 4279.)

§ 544e. Administration of scenic area

(a) Management of scenic area

The non-Federal lands within the scenic area shall be administered by the Commission in accordance with the management plan and sections 544 to 544p of this title.

(b) Adoption of scenic area land use ordinances.

(1) Within sixty days of initial receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit such letter or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (c) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance

to a land use ordinance at any time. Each county upon adoption of a land use ordinance shall promptly submit the ordinance to the Commission.

(3) Approval by Commission

(A) Within ninety days after receipt of a land use ordinance, the Commission, by majority vote including at least three members from each State, shall approve the ordinance unless it determines the ordinance is inconsistent with the management plan. Should the Commission fail to act within ninety days the ordinance shall be deemed to be approved.

(B) If approval is denied, the Commission shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the county suggested modifications to the ordinance to make it consistent with the management plan.

(C) Each county shall have ninety days after it receives recommendations from the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for approval. The Commission shall have sixty days to approve or disapprove the resubmitted ordinance. Any resubmitted ordinance shall become effective upon approval. Should the Commission disapprove the resubmitted ordinance, it shall promptly resubmit the ordinance for reconsideration. Should the Commission fail to act within sixty days, the ordinance shall be deemed to be approved.

(c) Commission land use ordinances

(1) Within ninety days after making a determination that a county has failed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area excluding urban areas identified in section 544b(e) of this title. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan. The ordinance may differ amongst the several parcels of land within the boundaries of the scenic area. The ordinance may from time to time be amended by the Commission.

(2) Subsequent compliance

In the event the Commission has promulgated regulations pursuant to this section, a county may thereafter upon written notice to the Commission elect to adopt a land use ordinance, in which event it shall comply with the provisions of this section for adoption of a land use ordinance. Upon approval of a land use ordinance by the Commission it shall supersede any regulations for the county developed by the Commission, subject to valid existing rights.

(d) Construction of facilities

The Secretary is hereby authorized to design, construct, operate and maintain such facilities as are included in the recreation assessment.

(Pub.L. 99-663, § 7, Nov. 17, 1986, 100 Stat. 4282.)

§ 544f. Administration of special management areas

(a) Administration of Federal lands

(1) The Secretary shall administer Federal lands within the special management areas in accordance with sections 544 to 544p of this title and other laws, rules and regulations applicable to the national forest system. In addition, the construction of roads and the management, utilization and harvest of timber on Federal lands within the special management areas also shall be subject to Forest Service visual resource management guidelines. The Secretary shall utilize lands acquired through exchange in calculating the allowable sales quantity on the Gifford Pinchot and Mount Hood National Forests.

(b) Withdrawal of Federal lands

Subject to valid existing rights, all Federal lands located in the special management areas are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the mining laws of the United States, and from disposition under all laws pertaining to mineral and geothermal leasing: *Provided,* That the Secretary may allow the exploration, development, or production of sand, gravel, and crushed rock as necessary to construct, maintain, or reconstruct roads in the special management areas.

(c) Resource inventory

The Secretary shall complete a resource inventory for the special management areas consistent with the process

and substance of the inventory prescribed by section 544d(a)(l) of this title.

(d) Recreation assessment

Within two years after November 17, 1986, the Secretary shall complete an assessment of recreation resources in the special management areas and opportunities for enhancement of these resources. The recreation assessment shall—

(1) identify areas within the special management areas suitable for designation by the Commission pursuant to section 544d of this title for the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(2) identify areas within the special management areas suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities, and river access areas; and

(3) subject to the treaty or other rights of Indian tribes, identify areas with the special management areas suitable for use to increase access for recreation purposes to the Columbia River and its tributaries.

(e) Land use designations

Within three years after November 17, 1986, the Secretary shall develop land use designations for the special management areas. The land use designations shall be--

(1) based on the resource inventory prepared by the Secretary pursuant to this section; and

(2) consistent with the standards established in section 544d of this title.

(f) Guidelines for land use ordinances

(1) Within three years after November 17, 1986, the Secretary shall, in consultation with the Commission, develop guidelines to assure that non-Federal lands within the special management areas are managed consistent with the standards in section 544d of this title and the purposes of sections 544 to 544p of this title. The Secretary shall promptly transmit the guidelines to the Commission for inclusion in the management plan. The guidelines shall require that management utilization, and disposal of timber, and exploration, development, and production of sand, gravel, and crushed rock for the construction, maintenance, or reconstruction of roads used to manage or harvest forest products on non-Federal lands within the special management areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area.

(h)[1] Adoption of special management area land use ordinances

(1) Within sixty days of receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit a letter as provided in this subsection, or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (*l*) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a special management area land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance to a land use ordinance at any time. Each county upon adoption of a special management area land use ordinance shall promptly submit the adopted ordinance to the Commission.

(i) Review by Commission

(1) The Commission shall review the special management area land use ordinance received from each county, and within ninety days after receipt shall make a tentative determination as to whether the ordinance is consistent with the management plan. If the Commission makes a tentative determination that the land use ordinance is consistent with the management plan, the Commission shall send the ordinance to the Secretary for concurrence.

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[1] So in original. No subsec. (g) was enacted.

(2) If the Commission makes a tentative determination that the land use ordinance is inconsistent with the management plan, the Commission shall state the reasons for the determination and shall return the ordinance to the appropriate county with suggested modifications required for consistency with the management plan.

(3) Each county shall have ninety days after it is notified by the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for tentative determination of consistency. The Commission shall have sixty days to make a tentative consistency determination on the resubmitted ordinance. If found consistent, the land use ordinance shall be transmitted by the Commission to the Secretary for concurrence that the ordinance is consistent with the management plan. If the Commission finds the resubmitted ordinance inconsistent, the Commission shall adopt an ordinance pursuant to subsection (*l*) of this section.

(j) Concurrence by Secretary; denial of concurrence

(1) Upon receipt of a special management area land use ordinance from the Commission, the Secretary shall notify the public of such receipt and shall, within ninety days thereafter, concur with the Commission's tentative determination of consistency with the management plan unless the Secretary determines the ordinance is inconsistent. Any ordinance submitted to the Secretary shall become effective upon notification of concurrence. Should the Secretary fail to act within ninety days, the

Secretary shall be deemed to have concurred with the Commission's tentative consistency determination.

(2) If concurrence is denied, the Secretary shall state the reasons therefor and shall submit to the Commission suggested modifications to the land use ordinances to make them consistent with the management plan and the purposes of sections 544 to 544p of this title.

(k) Commission reconsideration

Upon receipt of notification of non-concurrence by the Secretary, the Commission shall resubmit the land use ordinance to the appropriate county. Such county shall within ninety days, reconsider and revise the ordinance and resubmit the ordinance to the Commission for reconsideration in accordance with the provisions of this section. Should the Secretary again deny concurrence, the Commission shall either prepare a land use ordinance for such county pursuant to subsection (*l*) of this section or, by a two-thirds vote of the membership of the Commission including a majority of the members appointed from each State, determine that the ordinance is consistent with the management plan.

***(l)* Commission Ordinances**

(1) Within ninety days after making a determination that a county has failed to comply with the provisions of subsection (h) of this section, the Commission shall make and publish an ordinance setting standards for the use of non-Federal lands of such county within the boundaries of the special management areas. The ordinances shall

have the object of assuring that the use of such lands is consistent with the management plan. The ordinances may differ amongst the several parcels of land within the boundaries of the special management areas. The ordinances may from time to time be amended by the Commission.

(2) The Commission shall promptly submit the ordinance to the Secretary. The Secretary shall, within ninety days after receipt of the ordinance from the Commission, concur with the tentative determination that the land use ordinance is consistent with management plan unless a determination of inconsistency is made. Any ordinance submitted to the Secretary shall become effective upon concurrence. Should the Secretary fail to concur within ninety days, the land use ordinance shall be effective.

(3) If concurrence is denied, the Secretary shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the Commission suggested modifications to the ordinance to make it consistent with the plan.

(4) The Commission shall have ninety days after it receives recommendations from the Secretary to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Secretary for concurrence. The Secretary shall have sixty days to concur with the resubmitted ordinance. Any resubmitted ordinance shall become effective upon concurrence by the Secretary. Should the Secretary deny concurrence for the resubmitted ordinance, the Secretary shall state the reasons therefor and shall promptly resubmit the ordinance for reconsideration. Should the Secretary fail to concur

within sixty days, the ordinance shall be deemed effective.

(5) Within one hundred and twenty days after receipt of notification of non-concurrence, the Commission shall—

(A) revise and resubmit the land use ordinance to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a land use ordinance consistent with the provisions of this section and the purposes of sections 544 to 544p of this title.

(m) Subsequent compliance

In the event the Commission has adopted an ordinance pursuant to this section, the affected county may thereafter, upon written notice to the Commission and to the Secretary, elect to adopt a special management area land use ordinance, in which event it shall comply with the provisions of this section for adoption of special management area land use ordinances. Upon concurrence of such land use ordinances by the Secretary, they shall supersede any special management area land use ordinances for the county development by the Commission, subject to valid existing rights.

(n) Effect of Secretary's non-concurrence

If the Secretary does not concur in any land use ordinance approved or adopted by the Commission pursuant to this section, the availability of certain funds to the relevant county shall be governed by section 544n(c) of this title.

***(o)* Special rules**

Any ordinance adopted pursuant to this section shall not apply to any parcel or parcels of land within a special management area if, after the date such ordinance has been adopted, three years have elapsed after a landowner has made a bona fide offer to sell at fair market value or otherwise convey such parcel or parcels to the Secretary, unless the affected landowner agrees to an extension of the three year period: *Provided,* That an offer shall not be considered bona fide if the landowner refuses consideration equal to the fair market value as appraised in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Interagency Land Acquisition Conference, 1973). Lands for which an ordinance is suspended pursuant to this subsection shall be subject to the relevant scenic area land use ordinance adopted pursuant to section 544e of this title.

(Pub. L. 99-663, § 8, Nov. 17, 1986, 100 Stat. 4283.)

§ 544g. Land acquisition

(a) Acquisition authorized

(1) The Secretary is authorized to acquire any lands or interests therein within the special management areas and the Dodson/Warrendale Special Purchase Unit which the Secretary determines are needed to achieve the purposes of sections 544 to 544p of this title: *Provided,* That any lands, waters, or interests therein owned by either State or any political subdivision thereof may be acquired only by donation or exchange.

(2) Lands within the State of Oregon acquired by the Secretary pursuant to sections 544 to 544p of this title shall become part of the Mount Hood National Forest. Lands within the State of Washington acquired by the Secretary pursuant to this section shall become part of the Gifford Pinchot National Forest. All lands acquired by the Secretary pursuant to sections 544 to 544p of this title shall be subject to the laws and regulations pertaining to the National Forest System and sections 544 to 544p of this title.

(b) Limitations on eminent domain

(1) Where authorized in subsection (a) of this section to acquire land or interests therein without the consent of the owner, the Secretary shall—

> (A) acquire only such land or interests therein as is reasonably necessary to accomplish the purposes of sections 544 to 544p of this title; and

(B) do so only in cases where all reasonable efforts to acquire with the consent of the owner such lands, or interests therein, have failed.

(2) Notwithstanding the provisions of subsection (a) of this section, the Secretary may not acquire without the consent of the owner lands or interests therein which—

(A) on November 17, 1986, were used primarily for educational, religious, or charitable purposes, single-family residential purposes, farming, or grazing so long as the existing character of that use is not substantially changed or permitted for change;

(B) are located in counties with land use ordinances in which the Secretary has concurred pursuant to section 544f of this title, unless such lands are being used, or are in imminent danger of being used, in a manner incompatible with such ordinances;

(C) are within the boundaries of the Dodson/Warrendale Special Purchase Unit; or

(D) are owned by an Indian tribe, held in trust by the United States for an Indian tribe or member of an Indian tribe, or otherwise administered by the United States for the benefit of an Indian tribe or member of an Indian tribe.

(c) Hardship cases

In exercising authority to acquire lands pursuant to this section the Secretary shall give prompt and careful consideration to any offer made by any person or entity owning any land, or interest in land, within the boundaries of a special management area. In considering such

offer, the Secretary shall take into consideration any hardship to the owner which might result from any undue delay in acquiring the property.

(d) Land exchanges

(1) The Secretary is authorized and directed, in conformance with the provisions of this subsection, to acquire by exchange any parcel of unimproved forest land at least forty acres in size within the boundaries of the special management areas which is owned by any private forest land owner if, after enactment of this Act but within one hundred and eighty days after final adoption of the management plan, such private forest land owner offers to the United States such parcel of forest land.

(2) In exercising this authority to acquire forest lands pursuant to this subsection, the Secretary may accept title to such lands and convey to the owner federally owned lands deemed appropriate by the Secretary within the States of Oregon and Washington, regardless of the State in which the transferred lands are located. Forest lands exchanged pursuant to this subsection shall be of approximately equal value: *Provided,* That the Secretary may accept cash from or pay cash to the grantor in such an exchange in order to equalize minor differences in the values of the properties exchanged: *Provided further,* That the Secretary may reserve in any conveyance pursuant to this subsection such easements, subsurface rights, and any other interests in land deemed necessary or desirable: *Provide further,* That the valuation of lands

exchanged shall be determined in terms of forest uses for timber.

(3) It is the intention of Congress that land exchanges pursuant to this subsection shall be completed no later than five years after November 17, 1986. No later than sixty days after November 17, 1986, and every one hundred and eighty days thereafter, the Secretary shall report in writing to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives, on the status of negotiations with owners of non-Federal lands to effect the exchanges authorized by this subsection.

(4) In the event that exchanges authorized by this section leave any private forest land owner with ownership of an uneconomic remnant of forest land contiguous to a special management area, the Secretary is authorized to acquire such forest lands as if they were within the boundaries of a special management area.

(5) The following-described Federal lands and interests therein are hereby identified as candidate lands for exchanges conducted pursuant to this section: *Provided,* That the determination of which candidate lands will be exchanged, and in what sequence, shall be at the discretion of the Secretary. Subject to valid existing rights, such lands are hereby withdrawn from all forms of entry or appropriation or disposal under the public land laws, and from location, entry, and patent under the United States mining law, and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto until the Secretary determines such

lands are no longer needed to complete exchanges authorized by this section: *Provided,* That such period shall not extend beyond five years:

GIFFORD PINCHOT NATIONAL FOREST

Wind River-Panther Creek Area

Section	Township	Range
35	4N	7E
36	4N	7E

Approx. 430 acres.

South Swift Area

Section	Township	Range
13	6N	5E
23	6N	5E
17	6N	6E
18	6N	6E

Approx. 1,920 acres.

National Area

Section	Township	Range
6	14N	7E
7	14N	7E
18	14N	7E
30	14N	7E

Approx. 2,560 acres.

Buck Creek-Willard Area

Section	Township	Range
16	3N	9E
1	4N	9E
2	4N	9E
3	4N	9E
10	4N	9E
11	4N	9E
12	4N	9E
15	4N	9E
21	4N	9E
22	4N	9E
26	4N	9E
27	4N	9E
28	4N	9E
29	4N	9E
30	4N	9E
31	4N	9E
32	4N	9E
33	4N	9E
34	4N	9E
35	4N	9E
6	4N	10E
7	4N	10E
5	5N	10E
6	5N	10E
7	5N	10E
8	5N	10E
9	5N	10E
30	5N	10E
31	5N	10E
32	5N	10E

Approx. 14,460 acres.

SIUSLAW NATIONAL FOREST

East Beaver Area

Section	Township	Range
33	2S	9W
34	2S	9W
2	3S	9W
3	3S	9W
4	3S	9W
8	3S	9W
9	3S	9W
17	3S	9W

Approx. 3,053 acres.

WILLAMETTE NATIONAL FOREST

Ida-McCoy Area

Section	Township	Range
21	10S	6E
28	10S	6E

Approx. 680 acres.

MOUNT HOOD NATIONAL FOREST

Estacada Area

Section	Township	Range
15	4S	5E

Approx. 560 acres.

Hood River Area

Section	Township	Range
4	1N	9E
36	1N	10E
31	1N	11E
2	1S	9E
3	1S	9E
4	1S	9E
5	1S	9E
6	1S	9E

Approx. 5,800 acres.

Zig-Zag Area

Section	Township	Range
22	2S	7E
29	2S	7E

Approx. 280 acres.
Total acreage: 29,743.

(e) Boundaries

For the purposes of section 460*l*-9 of this title, the boundaries of the scenic area, including special management areas and the Dodson/Warrendale Special Purchase Unit shall be treated as if they were within the boundaries of the Mount Hood or Gifford Pinchot National Forests as of January 1, 1965.

(Pub. L. 99-663, § 9, Nov. 17, 1986, 100 Stat. 4287.)

§ 544h. Interim management

(a) Interim guidances

(1) Within one hundred and eighty days after November 17, 1986, the Secretary shall develop interim guidelines for the scenic area outside urban areas to identify land use activities which are inconsistent with sections 544 to 544p of this title and to govern the authority to acquire land without the consent of the owner provided by subsection (b) of this section. The Secretary shall promptly notify the public of adoption of the interim guidelines and transmit the guidelines to each county. Guidelines adopted by the Secretary pursuant to this subsection shall remain in effect for each county until the Secretary has developed guidelines for the special management areas pursuant to section 544f of this title and the land use ordinances prescribed by section 544e of this title are in effect.

(b) Interim acquisition authority and injunctive relief

Prior to the concurrence by the Secretary of land use ordinances prescribed by section 544f of this title and the approval by the Commission of land use ordinances prescribed by section 544e of this title, the following authorities are granted:

(1) The Secretary may acquire by condemnation any land or interest which is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the

scenic area: *Provided,* That no lands or interests therein can be acquired by condemnation pursuant to this section if used in the same manner and for the same purposes as used on the effective date of this Act, unless such land is used for or interest is in the development of sand, gravel, or crushed rock, or the disposal of refuse: *Provided further,* That within thirty days of the filing by the Secretary of a complaint for condemnation of any land or interest in the scenic area, outside of the special management areas and urban areas, the Commission, by a vote of two-thirds of its membership including a majority of the members appointed from each State, or if the Commission is not in existence the governor of the State in which the land or interest is located, may disapprove such proposed complaint.

(2) Upon or after the commencement of any action for condemnation pursuant to this subsection, the Secretary, acting through the Attorney General of the United States, may apply to the appropriate United States District Court for a temporary restraining order or injunction to prohibit the use of any property within the scenic area, but outside of urban areas, which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation and natural resources of the scenic area or is otherwise inconsistent with the purposes for which the scenic area was established. During the period of such order or injunction, the Secretary shall diligently and in good faith negotiate with the owner of the property to assure that, following termination of the order or injunction, the inconsistent use is abated or the adverse effect is mitigated.

(c) Review of development action

Prior to the effective date of a land use ordinance for each county pursuant to section 544e of this title, and concurrence of the Secretary on a land use ordinance for each county pursuant to section 544f of this title, the Commission shall review all proposals for major development actions and new residential development in such county in the scenic area, except urban areas. The Commission shall allow major development actions and new residential development only if it determines that such development is consistent with the standards contained in section 544d of this title and the purposes of sections 544 to 544p of this title.

(Pub.L. 99-663, § 10, Nov. 17, 1986, 100 Stat. 4291.)

§ 544i. Economic development

(a) Economic development plan

Based on the Economic Opportunity Study and other appropriate information, each State, in consultation with the counties and the Commission, shall develop a plan for economic development projects for which grants under this section may be used in a manner consistent with sections 544 to 544p of this title.

(b) Funds provided to states for grants

Upon certification of the management plan, and receipt of a plan referred to in subsection (a) of this section, the Secretary shall provide $5,000,000 to each State which each State shall use to make grants and loans

for economic development projects that further the purposes of sections 544 to 544p of this title.

(c) Conditions of grants

Each State making grants under this section shall require as a condition of a grant that—

(1) all activities undertaken under the grant are certified by the Commission as being consistent with the purposes of sections 544 to 544p of this title, the management plan, and land use ordinances adopted pursuant to sections 544 to 544p of this title;

(2) grants and loans are not used to relocate a business from one community to another;

(3) grants and loans are not used for program administration; and

(4) grants and loans are used only in counties which have in effect land use ordinances found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title.

(d) Report

Each State shall—

(1) prepare and provide the Secretary with an annual report to the Secretary on the use of the funds made available under this section;

(2) make available to the Secretary and to the Commission, upon request, all accounts, financial records, and other information related to grants and loans made available pursuant to this section; and

(3) as loans are repaid, make additional grants and loans with the money made available for obligation by such repayments.

(Pub.L. 99-663. § 11, Nov. 17, 1986, 100 Stat. 4292.)

§ 544j. Old Columbia River Highway

The Oregon Department of Transportation shall, in consultation with the Secretary and the Commission, the State of Oregon and the counties and cities in which the Old Columbia River Highway is located, prepare a program and undertake efforts to preserve and restore the continuity and historic integrity of the remaining segments of the Old Columbia River Highway for public use as a Historic Road, including recreation trails to connect intact and usable segments.

(Pub.L. 99-663, § 12, Nov. 17, 1986, 100 Stat. 4293.)

§ 544k. Tributary rivers and streams

(a) Water resources projects

The following rivers and streams shall be subject to the same restrictions on the licensing, permitting, and exempting from licensing and the construction of water resource projects as provided for components of the National Wild and Scenic rivers System pursuant to section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278(a)):

(1) any tributary river or stream to the Columbia River not designated in subsections (c) or (d) of this section or otherwise specified in this subsection which flows in whole or in part

through a special management area, unless the construction of a water resources project would not have a direct and adverse effect on the scenic, cultural, recreation, and natural resources of the scenic area;

(2) any river or river segment which flows in whole or in part through the scenic area and which is established pursuant to State law as a wild, scenic, or recreation river or which is under study pursuant to State law for the potential inclusion in any such State protected river system, unless such project or projects meet terms and conditions set by State agencies exercising administration over such river or river segment;

(3) the Wind River, Washington, for a period not less than three years following the later of—

(A) final approval of the Gifford Pinchot National Forest Plan, adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended) (16 U.S.C. 1660 et seq.); or

(B) submittal by the Secretary of a report to the President on the suitability or nonsuitability for addition to the national wild and scenic rivers system and a report by the President to the Congress of recommendations and proposals with respect to the designation of such river under the Wild and Scenic Rivers Act [16 U.S.C.A. § 1271 et seq.];

(4) the Hood River, Oregon, for a period not to exceed twenty years from November 17,

1986, if such facility impounds or diverts water other than by means of a dam or diversion existing as of November 17, 1986; and

(5) the segment of the Little White Salmon, Washington, from the Willard National Fish Hatchery to its confluence with the Columbia River if such facility impounds or diverts water other than by means of a dam or diversion existing as of November 17, 1986.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to those portions of tributary rivers or streams to the Columbia River which flow through or border on Indian reservations. Nothing in this section shall apply to or affect any segment of any river designated as a wild and scenic river under section 3 of the Wild and Scenic Rivers Act (16 U.S.C. 1274) or any river designated for study under section 5 of such Act (16 U.S.C. 1276).

(Pub.L. 99-663, § 13(a), (b), Nov. 17, 1986, 100 Stat. 4293.)

§ 544*l*. Implementation measures

(a) Assistance to counties

The Secretary shall provide technical assistance on a nonreimbursable basis to counties for the development of land use ordinances prescribed by sections 544e and 544f of this title: *Provided,* That in the event a county fails to obtain approval by the Commission for a land use ordinance within three years after the date technical assistance is first provided under this subsection for the development of a land use ordinance, the Secretary shall

terminate all technical assistance for any participation in the development of such ordinance.

(b) Payment of timber receipts

(1) Notwithstanding the provisions of the last paragraph under the heading "Forest Service" of the Act of May 23, 1908 (c. 192, 35 Stat. 251, as amended; 16 U.S.C. 500 [16 U.S.C.A. § 500]), and of section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961, as amended; 16 U.S.C. 500 [16 U.S.C.A. § 500]), that portion of which is paid under such provisions to the State of Oregon with respect to the special management areas within the Mount Hood National Forest, the Gates of the Columbia Gorge Special Management Area, Mount Hood National forest, and to the State of Washington with respect to the special management areas within the Gifford Pinchot National Forest—

(A) not less than 50 per centum shall be expended for the benefit of the public schools of the county which has adopted implementation measures pursuant to sections 544 to 544p of this title; and

(B) the remainder shall be expended for the benefit of public roads or any public purposes of any county which has adopted implementation measures pursuant to sections 544 to 544p of this title.

(2) Paragraph (1) of this subsection shall not apply—

(A) to any amount paid by the Secretary of the Treasury under the provisions of law referred to in subsection (b)(1) of this section at

the end of any fiscal year ending before November 17, 1986; or

(B) for a particular county, if the county does not have in effect a land use ordinance which has been found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title.

(c) Payments to local governments

(1) Subject to section 544n(b) of this title, in the case of any land or interest therein acquired by the Secretary pursuant to section 544g of this title, which was subject to local real property taxes within the five years preceding such acquisition and which is located in a county which has in effect a land use ordinance which has been found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title, the Secretary is authorized and directed to make annual payments to the county in which such lands are located in an amount equal to 1 per centum of the fair market value of such land or interest therein on the date of acquisition by the Secretary.

(2) Notwithstanding paragraph (1) of this subsection, any payment made for any fiscal year to a county pursuant to this subsection shall not exceed the amount of real property taxes assessed and levied on such property during the last full fiscal year before the fiscal year in which such land or interest therein was acquired by the Secretary.

(3) No payment shall be made under this subsection with respect to any land or interest therein after the fifth

full fiscal year beginning after the first fiscal year in which such a payment was made with respect to such land or interest therein.

(d) Federal consistency

Except as otherwise provided in subsection (e) of this section or in section 544*o* of this title, Federal agencies having responsibilities within the scenic area shall exercise such responsibilities consistent with the provisions of sections 544 to 544p of this title as determined by the Secretary.

(e) Limitations of federal expenditures affecting scenic area

(1) Except as provided in paragraph (3), if the Commission has not been established pursuant to section 544c of this title within fifteen months after November 17, 1986, or is otherwise disestablished for any reason, no new expenditures or new financial assistance may be made available, and no new license or new permit, or exemption from a license or permit requirement, shall be issued, under authority of any Federal law for any activity within the scenic area, excluding urban areas, which the Secretary,[1] determines is inconsistent with any implementation measure pursuant to, the standards established in section 544d(b) of this title, or the purposes of sections 544 to 544p of this title.

(2)(A)(i) An expenditure or financial assistance made available under authority of Federal law shall be

treated, for purposes of this subsection, as a new expenditure or new financial assistance if—

(I) in any case with respect to which specific appropriations are required, no money for construction or purchase was appropriated before October 1, 1986; or

(II) no legally binding commitment for the expenditure or financial assistance was made before October 1, 1986.

(ii) Payments made to the State pursuant to the following acts shall not be treated as an expenditure or financial assistance for purposes of this subsection: the Act of May 23, 1908, (c. 192, 35 Stat. 251; 16 U.S.C. 500 [16 U.S.C.A. § 500]); section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961; 16 U.S.C. 500 [16 U.S.C.A. § 500]); the Mineral Lands Leasing Act of 1920 [30 U.S.C.A. § 181 et seq.]; chapter 69 of Title 31 (relating to payments in lieu of taxes for entitlement land); the Act of June 9, 1916 (39 Stat. 218), and the Act of Feb. 26, 1919 (40 Stat. 1179).

(B) A license or permit, or exemption from a license or permit requirement, shall be treated, for purposes of this subsection, as a new license or new permit, or exemption from a license or permit requirement, if such license or permit, or exemption from a license or permit requirement, was issued on or after October 1, 1986. A renewal under similar terms and conditions of a license or permit, or exemption from a license or permit requirement, issued before October 1, 1986, shall not be treated as a new license or new permit, or exemption from a license or permit requirement.

(3) Notwithstanding paragraph (1), the appropriate Federal officer, after consultation with the Secretary, may make Federal expenditures or financial assistance available within the area for any of the following:

(A) The maintenance of existing channel improvements and related structures, and including the disposal of dredge materials related to such improvements.

(B) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities that are essential links in a larger network or system.

(C) Military activities essential to national security.

(D) Any of the following actions or projects, but only if the making available of expenditures or assistance therefor is consistent with the standards in section 544d(b) of this title and the purposes of sections 544 to 544p of this title:

(i) Projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to, acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects.

(ii) The establishment, operation, and maintenance of air and water navigation aids and devices, and for access thereto.

(iii) Projects under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 through 11) [16 U.S.C.A.

§ 4601-4 et seq.] and the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(iv) Scientific research, including but not limited to aeronautical, atmospheric, space, geologic, marine, fish and wildlife, and other research, development, and applications.

(v) Assistance for emergency actions essential to the saving of lives and the protection of property and the public health and safety, if such actions are performed pursuant to sections 5145 and 5146 of Title 42 and section 4103 of Title 42 and are limited to actions that are necessary to alleviate the emergency.

(vi) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities. This clause shall not apply to roads, structures, or facilities referred to in paragraph (3)(B).

(vii) Nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.

(4) The Director of the Office of Management and Budget shall, on behalf of each Federal agency concerned, make written certification that each such agency has complied with the provisions of this subsection during each fiscal year beginning after September 30, 1987. Such certification shall be submitted on an annual basis to the House of Representatives and the Senate pursuant to the schedule required under the Congressional Budget and Impoundment Control Act of 1974.

(5) Nothing contained in this subsection shall be construed as indicating an intent on the part of the Congress to change the existing relationship of other Federal laws to the law of a State, or a political subdivision of a State, or to relieve any person or any obligation imposed by any law of any State, or political subdivision of a State. No provision of this subsection shall be construed to invalidate any provision of State or local law unless there is a direct conflict between such provision and the law of the State, or political subdivision of the State, so that the two cannot be reconciled or consistently stand together. This subsection shall in no way be interpreted to interfere with a State's right to protect, rehabilitate, preserve, and restore lands within its established boundary.

(f) Transfer of public lands

Subject to valid existing rights, all public lands within the scenic area administered by the Secretary of the Interior through the Bureau of Land Management are hereby transferred without consideration to the jurisdiction of the Secretary to be managed as National Forest lands in accordance with the provisions of sections 544 to 544p of this title.

(Pub.L. 99-663, § 14, Nov. 17, 1986, 100 Stat. 4294.)

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[1] So in original. Comma probably should not appear.

§ 544m. Enforcement

(a) Administrative remedies

(1) Commission orders

The Commission shall monitor activities of counties pursuant to sections 544 to 544p of this title and shall take such actions as it determines are necessary to ensure compliance.

(2) Appeal to commission

Any person or entity adversely affected by any final action or order of a county relating to the implementation of sections 544 to 544p of this title may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.

(3) Civil penalties

Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to sections 544 to 544p of this title may be assessed a civil penalty by the Commission not to exceed $10,000 for each violation. No penalty may be assessed under this subsection unless such person or entity is given notice and opportunity for a public hearing with respect to such violation. The Commission may compromise, modify, or remit, with or without conditions, any penalty imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

(b) Judicial remedies

(1) Civil actions to enforce sections 544 to 544p of this title

(A) Except as otherwise limited by sections 544 to 544p of this title, the Attorney General of the United States may, at the request of the Secretary, institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the special management areas in violation of the provisions of sections 544 to 544p of this title, interim guideline adopted or other action taken by the Secretary pursuant to sections 544 to 544p of this title.

(B) The Commission, or, at the request of the Commission, or the attorney general of Oregon or Washington, may institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the scenic area outside urban areas in violation of the provisions of sections 544 to 544p of this title, the management plan, or any land use ordinance or interim guideline adopted or other action taken by the Commission or any county pursuant to sections 544 to 544p of this title.

(2) Citizens suits

Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title—

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of sections 544 to 544p of this title, the management plan or any land use ordinance or interim guideline

adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under sections 544 to 544p of this title; or

(B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission or any county to perform any act or duty under sections 544 to 544p of this title which is not discretionary with the Secretary, the Commission or any county.

(3) Limitation on bringing of citizens suits

No action may be commenced—

(A) under paragraph (2)(A) of this subsection—

(i) prior to sixty days after the plaintiff has given notice in writing of the alleged violation to the Secretary, to the Commission, and to the county in which the violation is alleged to have occurred; or

(ii) if the Attorney General of the United States, or the attorney general of Oregon or Washington, has commenced and is diligently prosecuting a civil action on the same matter pursuant to paragraph (1) of this subsection to require compliance with the management plan or any regulations, guidelines, or standards issued or other actions taken by the Secretary, the Commission, or any county pursuant to sections 544 to 544p of this title: *Provided,* That in any such action any person or entity otherwise entitled to bring an action pursuant to paragraph (2) of this subsection may intervene as a matter of right; or

(iii) which challenges the consistency of the draft management plan with the purposes and standards of sections 544 to 544p of this title or with other applicable law prior to the certification or adoption of the Management Plan pursuant to section 544d of this title; or

(B) under paragraph (2)(B) of this subsection prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, the Commission, and to the county in which the failure to perform any act or duty pursuant to sections 544 to 544p of this title is alleged: *Provided,* That such action may be brought immediately after such notification where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(4) Judicial review

Any person or entity adversely affected by—

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of sections 544 to 544p of this title;

(B) any land use ordinance or interim guideline adopted pursuant to sections 544 to 544p of this title;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified

in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

(5) Federal court jurisdiction

The United States district courts located in the States of Oregon and Washington shall have jurisdiction over—

(A) any criminal penalty imposed pursuant to section 551 of this title, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to sections 544 to 544p of this title;

(B) any civil action brought against the Secretary pursuant to this section; or

(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(6) State court jurisdiction

The State courts of the States of Oregon and Washington shall have jurisdiction—

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over any civil action brought by the Commission pursuant to subsection

(b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;

(C) over any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

(Pub. L. 99-663, § 15, Nov. 17, 1986, 100 Stat. 4297.)

§ 544n. Authorization of appropriations

(a) Authorizations

There are authorized to be appropriated for fiscal years after the fiscal year 1986 such sums as are described below;

(1) For the purpose of acquisition of lands, water and interests therein pursuant to sections 544 to 544p of this title: $40,000,000: *Provided,* That of this amount no more than $10,000,000 shall be available to acquire lands, water, and interests therein pursuant to section 544h of this title. Such amounts are authorized to be appropriated from amounts covered into the Land and Water Conservation Fund notwithstanding any allocation, apportionment, or limitation contained in the Land and Water Conservation Fund (16 U.S.C. 4601-4 and following).

(2) For the purpose of providing payments to local governments pursuant to section 544*l*(c) of this title: $2,000,000.

(b) Appropriation upon concurrence of management plan

There are authorized to be appropriated for fiscal years after the fiscal year 1986, effective upon concurrence on the management plan pursuant to section 544d of this title:

(1) For the purpose of construction of an interpretive center to be located in the State of Oregon, and a conference center to be located in the State of Washington: $10,000,000.

(2) For the purpose of construction of recreation facilities pursuant to section 544e(d) of this title: $10,000,000.

(3) For the purpose of preparing a program and restoring and reconstructing the Old Columbia River Scenic Highway, Oregon pursuant to section 544j of this title: $2,800,000.

(4) For the purpose of providing economic development grants pursuant to section 544i of this title: $5,000,000 for each State: *Provided,* That funds authorized to be appropriated pursuant to this paragraph shall be available for the acquisition of lands and interests therein pursuant to section 544h of this title if, at the expiration of three years, the States have failed to carry out their respective function pursuant to section 544c of this title.

(c) Availability of funds

Funds appropriated under subsections (a)(2) and (b) of this section shall not be made available for any county which does not have in effect a land use ordinance which has been found to be consistent by the Commission, and

concurred on by the Secretary as consistent with the management plan pursuant to section 544f of this title.

(Pub.L. 99-663, § 16, Nov. 17, 1986, 100 Stat. 4300.)

§ 544*o*. Savings provisions

(a) Effect on rights of Indians, use of water, rivers and streams, interstate compacts, existing transmission facilities, hunting and fishing, forest plans, scenic areas

Nothing in sections 544 to 544p of this title shall—

(1) affect or modify any treaty or other rights of any Indian tribe;

(2) except as provided in section 544k(c) of this title, authorize the appropriation or use of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual;

(3) except as provided in section 544k(c) of this title, affect the rights or jurisdictions of the United States, the States, Indian tribes or other entities over waters of any river or stream or over any ground water resource or affect or interfere with transportation activities on any such river or stream;

(4) except as provided in section 544k(c) of this title, alter, establish, or affect the respective rights of the United States, the States, Indian tribes, or any person with respect to any water or water-related right;

(5) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States before the enactment of this Act;

(6) affect or modify the ability of the Bonneville Power Administration to operate, maintain, and modify existing transmission facilities;

(7) affect lands held in trust by the Secretary of the Interior for Indian tribes or individual members of Indian tribes or other lands acquired by the Army Corps of Engineers and administered by the Secretary of the Interior for the benefit of Indian tribes and individual members of Indian tribes;

(8) affect the laws, rules and regulations pertaining to hunting and fishing under existing State and Federal laws and Indian treaties;

(9) require any revision or amendment of any forest plan adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended (16 U.S.C. 1600 et seq.) [16 U.S.C.A. § 1600 et seq.]); or

(10) establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas.

(b) Improvement of navigation facilities at Bonneville Dam

Except for the offsite disposal of excavation material, nothing in sections 544 to 544p of this title shall be construed to affect or modify the responsibility of the

United States Army Corps of Engineers to improve navigation facilities at Bonneville Dam pursuant to Federal law.

(c) Responsibilities of non-Federal timber land owners

Except for the management, utilization, or disposal of timber resources of non-Federal lands within the special management areas, nothing in sections 544 to 544p of this title shall affect the rights and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable State law supersede such Acts.

(d) Interstate compacts

Mandatory language in sections 544 to 544p of this title respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title.

(e) Failure to establish Columbia River Gorge Commission; responsibility of Secretary

In the event that the States of Washington and Oregon fail to comply with the provisions of section 544c of this title, the Secretary shall not be obligated to take actions which are predicated upon the establishment of the Commission.

(f) Actions of Secretary as major Federal actions affecting the environment

(1) Actions by the Secretary pursuant to subsections (f), (g), and (h) of section 544d of this title; subsections (f), (j), (k), and (*l*) of section 544f of this title; section 544g of

this title; and subsections (a) and (b)(2) of section 544h of this title shall neither be considered major Federal actions significantly affecting the quality of the environment under section 102 of the National Environmental Policy Act (42 U.S.C. 4332 [42 U.S.C.A. § 4332]) nor require the preparation of an environmental assessment in accordance with that Act [42 U.S.C.A. § 4321 et seq.].

(2) Except as provided in paragraph (1) of this subsection, nothing in sections 544 to 544p of this title shall expand, restrict, or otherwise alter the duties of the Secretary under the National Environmental Policy Act.

(Pub. L. 99-663, § 17, Nov. 17, 1986, 100 Stat. 4300.)

§ 544p. Severability

(a) If any provision of sections 544 to 544p of this title or the application thereof to any person, State, Indian tribe, entity, or circumstance is held invalid, neither the remainder of sections 544 to 544p of this title, nor the application of any provisions herein to other persons, States, Indian tribes, entities, or circumstances, shall be affected thereby.

(Pub. L. 99-663. § 18, Nov. 17, 1986, 100 Stat. 4302)

APPENDIX E

United States Department of Agriculture
Forest Service
Pacific Northwest Region
[LOGO]

Columbia River Gorge
National Scenic Area

Final Interim Guidelines
June 30, 1987

Appendix to Complaint for Declaratory and Injunctive Relief

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CHAPTER I: INTRODUCTION

Public Law 99-663 was signed by President Reagan on November 17, 1986, establishing the Columbia River Gorge National Scenic Area. This law provides direction for a partnership of federal, state, and local agencies to develop a plan for protection and management of the resources in the Gorge. These Interim Guidelines establish the standards by which proposed developments and changes in land uses or enhancement proposals will be evaluated for consistency with the purposes of that legislation.

Section 10 of the Act requires that Interim Guidelines be adopted by the Secretary of Agriculture for the Scenic Area outside Urban Areas. According to the Act, the Interim Guidelines will provide standards to: 1) "identify new land use activities and developments which are

inconsistent with the Act," and 2) "to govern the authority to acquire land without the consent of the owner" (Section 10(a)).

These Interim Guidelines will "remain in effect for each county until the Secretary has developed guidelines for the Special Management Areas pursuant to Scetion 8 of the Act and the land use ordinances prescribed by Section 7 are in effect" (Section 10(a)). These are expected to be completed by the end of 1990.

A. BACKGROUND

The Columbia River Gorge National Scenic Area Act was established for two purposes: "1) to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and 2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing Urban Areas and by allowing future economic development in a manner consistent with the first purpose" (Section 3).

The Scenic Area Act gives special designation to two categories of land: Urban Areas and Special Management Areas. Thirteen communities in Oregon and Washington within the Scenic Area are designated as Urban Areas, and are exempt from most provisions of the legislation. Special Management Areas are generally the most environmentally sensitive lands, where activities are more restricted than in other parts of the Scenic Area. These include islands in the Columbia River. All areas not specifically designated as Special Management Areas or Urban Areas are identified as General Management Areas in

these Guidelines. Copies of maps with these designations are available from the Scenic Area offices.

Section 6(d) of the Act lists standards for the Management Plan which also are used as the basis for Interim Guidelines. The Management Plan will identify ways to provide the enhancement called for in Section 6(d), but the objective here is to provide needed protection in the meantime, and enhancement opportunities as they might occur. "The Management Plan, all land use ordinances, and Interim Guidelines shall include provisions to:

(1)protect and enhance agricultural lands for agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development, or forest lands;

(2)protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development, or open spaces;

(3)protect and enhance open spaces;

(4)protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the Recreation Assessment required by the Act;

(5)prohibit major development actions in Special Management Areas, except for partitions or short plats which the Secretary determines are desirable to facilitate land acquisitions pursuant to this Act;

(6)prohibit industrial development in the Scenic Area outside Urban Areas;

(7)require that commercial development outside Urban Areas take place without adversely affecting the scenic, cultural, recreation, or natural resources of the Scenic Area;

(8)require that residential development outside Urban Areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area; and

(9)require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the Scenic Area." (Section 6(d))

For any proposed land or water use activity or development outside Urban Areas, a determination will be made as to its consistency with the Act, using these Guidelines as standards for determinations of consistency. This includes lands managed by or activities proposed by federal, state or local public agencies, as well as private land uses and developments. There are some limitations on application of the Guidelines for certain agencies as described in Section 17 of the Scenic Area Act.

Lands which are "used or threatened to be used in a manner inconsistent with the purposes for which the Scenic Area was established, and which will cause or likely cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the area," may become subject to acquisition by the United States (Section 10(b)(1)).

CHAPTER II: INTERIM MANAGEMENT

A. ADMINISTRATION

The Scenic Area Act creates a partnership among the six counties within the Columbia River Gorge (Clark, Skamania, and Klickitat in Washington and Multnomah, Hood River, and Wasco in Oregon), a Bi-state Commission, and the USDA Forest Service. As explained in this Chapter, each partner has important, but different, responsibilities in the Scenic Area. Together these agencies provide the overall coordination and management to achieve the purposes of the Act.

These Guidelines were developed in consultation and cooperation with the local Scenic Area counties and other agencies in an attempt to avoid conflicts or inconsistencies in procedural requirements. They are not intended to supersede or eliminate the usual state or local development permit processes. Development applications will still be reviewed by these agencies, and must meet all applicable state and local laws and regulations. The National Scenic Area consistency determination is supplemental to those processes of state and local governments.

Prior to completion of the Management Plan and the adoption of county ordinances, the Bi-state Commission will evaluate proposals for major development actions and new residential development. "The Commission shall allow major development actions and new residential development only if it determines that such development is consistent with the standards contained in Section 6(d)

of the Act" (Section 10(c)). Urban Areas are exempt from this review.

The Forest Service will review proposals other than major development actions and residential development which are reviewed by the Commission. The Forest Service Scenic Area Manager is the official responsible for determining whether those proposals are consistent with the Act.

Where "land is being used or is threatened to be used in a manner inconsistent with the purposes for which the Scenic Area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, creation, and natural resources of the Scenic Area," the Secretary of Agriculture has the authority to acquire the land without consent of the owner (Section 10(b)(1)).

B. REVIEW OF PROPOSED LAND USE ACTIVITIES AND DEVELOPMENTS

APPLICATION REQUIREMENTS

Any change in existing land or water use or development will require a determination of consistency with the Scenic Area Act. To obtain this determination, a Land Use Application Form must be submitted to either the Forest Service or the Bi-State Commission Scenic Area offices. The Form provides the detailed information needed for the evaluation.

The Application Form should be submitted either prior to or at the same time as the application for the appropriate county permits. This Form is required for all types of proposals, regardless of whether or not a county permit is

required. Application forms are available at the Scenic Area offices and local County Planning offices.

Necessary information for the Application Form includes at least: 1) a legal description, a map of the location, and a plot plan for the project proposal; 2) a complete description of the proposal; 3) identification of the scenic, cultural, recreation and natural resources known to exist on the site; and 4) a discussion on how the project complies with these guidelines. To the extent possible, the Application Form will use the same information as that required for county permits. Where inventories already exist, such information will be provided to the applicant by the Forest Service. The applicant may also be requested to provide additional site analysis information.

EVALUATION PROCESS

Once a completed Application Form is received at the Scenic Area Office, it will be evaluated for consistency with the Act as soon as possible. In most cases the evaluation will take place within ten working days. Where a proposal appears to have potential for adverse effects on the scenic, cultural, recreation, or natural resources of the Scenic Area, it may require additional time. In cases requiring more than ten days, direct contact with the applicant will be made and an explanation of the status offered. The following section describes in detail the steps in the evaluation process.

Step 1

An applicant for a consistency determination will submit an Application Form to either the Bi-state Commission or Forest Service Scenic Area office. Applications must be complete, including the information discussed in Application Requirements, Section B-1 above, and relevant site analysis information as discussed in Chapter III.

Within one working day after receipt of a completed Application Form, a determination will be made as to which office will review the proposal. If it is a major development action or residential development, the Bi-State Commission will review it; the Forest Service will review all others. It will be forwarded to the appropriate office and a staff person will be assigned to coordinate the evaluation and prepare a report.

Step 2

For proposals reviewed by the Forest Service, Step 2 of the process will normally take ten working days to complete. During this time, staff will determine if the proposed action is consistent with the standards in Section 6(d) of the Act, or if it will adversely affect the scenic, cultural, recreation or natural resources of the Scenic Area, based on the guidelines in Chapter III of this document. This evaluation will consider all of the information provided in the application, and may also depend on discussions with other affected agencies and/or on-site field visits.

In some cases a land use or development proposal may have the potential to adversely affect the resources

intended to be protected and enhanced by the Scenic Area Act. If evaluation of a proposal indicates this potential, the applicant will be contacted. Frequently, adverse effects can be eliminated through design changes or adjustments in the magnitude or duration of the proposal. Through discussions between the Forest Service Staff and the applicant, mitigation measures may be designed and incorporated into the proposal in an attempt to reduce impacts to an acceptable level.

The amount of time required and the magnitude of the changes depend on the nature of the initial proposal. The Scenic Area staff will make every effort to expedite this redesign process. However, the applicant is primarily responsible for providing the data and information necessary to support a determination of consistency with the Scenic Area Act and these Interim Guidelines.

The project evaluation process which the Bi-State Commission staff will follow has yet to be determined. Upon completion of the evaluation, findings and recommendations will be forwarded to the Scenic Area Manager or the Commission for the final consistency determination.

Step 3

In Step 3 the Scenic Area Manager or the Bi-State Commission will make a determination of consistency for the proposed action. The report of findings and the determination of consistency will be forwarded to the applicant. Applicants receiving approved or consistent findings may continue the required permit process for their development with the appropriate county or other agencies. If other permits are not required, the project

may be implemented immediately. Where there is a finding of inconsistency, the applicant will lose protection from condemnation if the project is implemented.

For applications reviewed by the Forest Service, if mitigation and redesign features are not agreed upon, the applicant may seek administrative review of the inconsistency determination. Any affected person who objects to a determination made by the Scenic Area Manager may appeal the decision to the Regional Forester using standard procedures for administrative review contained in 36 CFR 211.18.

CHAPTER III: GUIDELINES FOR LAND AND WATER USE AND DEVELOPMENT

This chapter describes the standards by which changes in land or water uses or proposed developments will be evaluated for consistency with the Scenic Area Act. Section A contains general guidelines that apply to all proposals in the Scenic Area outside of Urban Aress.

Section B describes the guidelines by which any potential for adverse effects on scenic, cultural, recreation, or natural resources will be evaluated. Possible measures to mitigate adverse effects are discussed. The guidelines apply to land and water uses and development proposals of all types, except forest practices in the General Management Area and uses which are excluded in Section 17 of the Act.

Section C contains guidelines for each of the specific land uses addressed in the Scenic Area Act.

A. GUIDELINES FOR ALL DEVELOPMENT

The following guidelines apply to all proposals for land and water uses or developments outside Urban Areas:

1) Any use or development proposed by a federal, state, or local agency, or by any private party, shall be subject to a consistency determination unless specifically exempted herein or by the Savings provisions of Section 17 of the Act.

2) Any use or development that existed on the date of the Scenic Area Act, if used in the same manner and for the same purposes, is not affected by these guidelines, except: a) the development of sand, gravel, or crushed rock; b) the disposal of refuse; or c) uses discontinued for a period of more than one year. These listed uses are subject to a consistency determination. The policy defining vested rights for existing uses, adopted by the Scenic Area Manager on March 19, 1987, on file at the Scenic Area Offices, will be used for identifying uses that existed on the date of the Act.

3) Uses or developments shall not adversely affect the scenic, cultural, recreation, or natural resources of the Scenic Area.

4) Uses or developments which are found to be consistent with the Scenic Area Act remain subject to all applicable federal, state, and local laws, regulations, and requirements.

5) When a structure is destroyed or partially destroyed, it will be considered an existing use when replaced in

kind and in the same location within one year. The exterior color and reflectivity of replacement structures must be consistent with the scenic guidelines in Chapter III. Replacement of a structure or use that differs in size or location from the original shall be subject to a consistency determination.

6) When a use of development is discontinued for more than one year, its replacement shall be subject to a consistency determination.

7) Any modification to a use or development that alters a structure or use in size or location shall be subject to a consistency determination.

B. PROTECTION OF SCENIC, CULTURAL, RECREATION AND NATURAL RESOURCES

This section provides guidelines for land and water uses or developments, and for modifications to existing uses or developments, to insure that the scenic, cultural, recreation and natural resources are protected. Through application of these guidelines, protection of the resources can be achieved, setting the stage for long term enhancement in the Management Plan to be prepared during the next three to five years.

The guidelines in this section apply to most land and water uses and developments within the General Management Areas and Special Management areas, regardless of their use category. They do not apply to forest practices in the General Management Area or to other activities that are specifically exempted in the savings provisions in Section 17 of the Act.

Analysis of potential impacts will include consideration of cumulative effects and take into account any mitigation that is designed into the project. Where a use or development may impact Scenic Area resources, consistency with these guidelines can often be achieved through mitigation measures, or through redesign of the project to reduce or eliminate adverse consequences which might otherwise occur. The Scenic Area staff will discuss mitigation and redesign opportunities with the applicant in an attempt to allow a proposed use to proceed while still protecting Scenic Area resources. If mitigation and redesign features are not agreed upon, the applicant may seek administrative review of an inconsistency determination as discussed in Chapter II, Section B.

Consistency determinations shall be based on the following guidelines:

1. SCENIC RESOURCES

OBJECTIVE: To protect and enhance scenic resources in Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be accomplished by:

a. minimizing impacts on scenery that is viewed by the greatest number of people, i.e., key viewing areas;

b. insuring that development harmonizes with and complements its surroundings, rather than contrasts; and

c. avoiding dramatic changes in the landscape character where land or water uses or developments are proposed.

GUIDELINES

1) Proposed uses or developments shall protect or enhance the scenic resources by avoiding changes in the particular landscape setting, and/or by minimizing the impact from site-specific development.

2) Proposed uses or developments shall not change the landscape setting of a site or its immediate surroundings from an undeveloped to a rural or developed setting, or from a rural to a developed setting.

3) Proposed uses or developments shall not detract from or impair views from key viewing areas.

4) Size, shape, color, texture, siting, height, building materials, lighting or other features of a proposed development shall not noticeably contrast with the landscape setting.

5) Proposed structure shall not protrude above the line of a bluff, cliff, or skyline as seen from key viewing areas.

6) Proposed uses or developments shall be screened from view of key viewing areas. Wherever possible, screening will make use of topographic or other natural features and/or native vegetation.

7) Except as necessary for preparation of an actual building site, proposed uses or developments shall not appear to modify the vegetation as seen from key viewing areas.

8) Proposed improvements seen from key viewing areas shall be aligned, designed and sited to fit the natural topography and to minimize visible grading or other

modifications of land forms, vegetation cover, and natural characteristics. Improvements would include, but are not limited to: roads, parking areas, logging landings, rights-of-way, storage areas, fences, and site preparation for structures.

9) Proposed uses or developments in undeveloped and rural settings shall meet the visual quality objective of Partial Retention, as defined in the Forest Service Visual Management System.

10) Proposals for enhancement of scenic resources are encouraged as long as they will protect the cultural, recreation or natural resources.

2. CULTURAL RESOURCES

OBJECTIVE: To protect and enhance cultural resources in the Special Management Areas and General Management Areas pending completion of the Management Plan and implementing ordinances.

Protection will be accomplished by:

a. requiring identification of any cultural resources on sites proposed for new developments or changes in use;

b. requiring mitigation where possible to avoid adversely effecting cultural resources where they are identified; and

c. finding proposals inconsistent where mitigation will not result in adequate protection of the cultural resources.

GUIDELINES

1) Proposed uses or developments shall not damage or destroy cultural resources existing on the site or in the vicinity.

2) Proposed developments or changes in use on a parcel containing or likely to contain cultural resources shall require a cultural resource inventory to be conducted by a qualified professional.

3) Proposed uses or developments for sites where cultural resources are found shall include design of adequate mitigation measures. Mitigation must be designed in consultation with the State Historic Preservation Officer and/or the Advisory Council on Historic Preservation, as appropriate. Mitigation can include avoiding the site where the resources are found, properly protecting the resources from damage during development, or recovering the resource from the site. Where mitigation will not result in adequate protection, the proposal shall be found inconsistent with the Act.

4) Proposals for enhancement of cultural resources are encouraged as long as they will protect the scenic, recreation or natural resources.

3. RECREATION RESOURCES

OBJECTIVE: To protect and enhance recreation resources in the Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be accomplished by:

a. requiring identification of existing recreation resources in the vicinity that could be impacted by the proposed use or development;

2. requiring mitigation or redesign where possible to avoid adversely effecting the recreation resources; and

3. finding proposals inconsistent where mitigation will not result in adequate protection of the recreation resources.

GUIDELINES

1) Proposed uses or developments shall not displace or detract from an existing recreation use or change an existing recreation setting.

2) Proposed uses or developments shall not preclude options for future recreation use, especially those uses identified in the Recreation Assessment.

3) Proposals for enhancement of recreation resources are encouraged as long as they will protect the scenic, cultural, or natural resources.

4. NATURAL RESOURCES

OBJECTIVE: To protect and enhance natural resources in the Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be achieved by:

a. requiring identification of any natural resources on sites proposed for changes in use or development;

b. requiring mitigation where possible to avoid adversely effecting natural resources where they are located; and

c. finding proposals inconsistent where mitigation will not result in adequate protection of the natural resources.

1) Proposed developments or changes in use shall not degrade or destroy the natural resources existing on a site proposed for development, or cause off-site impacts that could result, individually or cumulatively, in degradation or destruction of natural resources in the Scenic Area.

2) Proposed uses or developments that disturb the ground or water drainage on active or stabilized earth flows (landslides)shall require geological evaluation, with adequate mitigation measures designed and applied to the site.

3) Proposals to remove silt and sand from boat channels, repair washed out areas, replace riprap, and repair or replace existing boat ramp areas shall protect the scenic, cultural, recreation, or natural resources.

4) Except as necessary to prevent imminent threat to like or property, proposed uses or developments shall not disturb normal drainage patterns of near wetlands.

5) Where threatened and endangered or sensitive plants or animals are found on a site proposed for development or a change in use, mitigation measures shall be applied for protection. If mitigation will not result in adequate protection, the proposal shall be found inconsistent with the Act.

6) Proposed uses or developments shall not alter habitats of threatened, endangered, or sensitive species, or

riparian areas, without design and implementation of adequate mitigation measures.

7) Proposed uses or developments shall maintain fish habitat at no less than the existing level.

8) In the Special Management Areas, proposed uses or developments shall maintain habitat for cavity nesting birds where practicable through retention of snags and fallen logs and other woody debris.

9) Proposed vegetation management projects or programs for noxious weeds, ground covers, competing vegetation, rights-of-way, or gravel and borrow pits, shall protect the scenic, cultural, recreation, or natural resources.

10) Proposals for enhancement of natural resources are encouraged as long as they will protect the scenic, cultural or recreation resources.

C. LAND USE STANDARDS

Section 6(d) of the Scenic Area Act requires that Interim Guidelines shall include the standards 1 through 9 as listed in Chapter 1. These are standards that apply to individual land or water uses and developments. Guidelines in this section apply these standards to proposed site-specific uses and developments outside Urban Areas. Regardless of the land use or development that is proposed, the guidelines in Section B for protection of scenic, cultural, recreation and natural resources apply as well. Consistency determinations for site-specific land uses and development proposals shall be guided by the following standards:

1. AGRICULTURAL LANDS

OBJECTIVE: To protect and enhance agricultural lands for agricultural uses.

GUIDELINES

a. Both Special and General Management Areas

1) Conversion of agricultural land to open space, recreation development, or forest land is consistent with the Act where such conversion will protect and enhance the scenic, cultural, recreation, and natural resource values of the area. Conversion to other uses is inconsistent with the Act.

2) The number and type of agriculture buildings constructed must be necessary and accessory to, and consistent with, the type of agricultural operations existing or planned in the area.

3) Buildings for processing agricultural products shall be used for products produced primarily on the given or adjacent property. "Primarily" means a clear majority of the product as measured by volume, weight and value. This includes small packing facilities, wine making operations, and other similar uses. Large scale agricultural processing operations for products produced elsewhere are considered industrial uses and are not consistent outside of Urban Areas.

4) Livestock feedlots are inconsistent with the Act.

2. FOREST LANDS

OBJECTIVE: To protect and enhance forest lands in the Scenic Area for forest use.

GUIDELINES

a. Both Special and General Management Areas

1) All forest practices on private lands are governed by the State Forest Practices Acts.

2) Conversion of forest land to agricultural land, recreation development, or open space is consistent with the Act where such conversion will protect and enhance the scenic, cultural, recreation, and natural resources of the area. Conversion to other uses is inconsistent with the Act.

3) Use of forest lands for other compatible uses while retaining the potential to carry out forest practices is consistent with the Act where it will protect and enhance the scenic, cultural, recreation, or natural values, and the use will comply with the appropriate land use guidelines in this chapter.

b. Special Management Areas

1) Forest practices must protect the scenic, cultural, recreation, or natural resources of the Scenic Area.

2) The Forest Service visual management system will be used to evaluate the impact of proposed forest practices on federal and non-federal land. The visual quality objective of Retention shall be applied in the foreground (roughly within one half mile of roads, trails, or key viewing areas), and Partial Retention shall be applied in

the middle-and background, with the result that management activities shall not be visually dominant in the landscape. (A description of the visual management system is available at any Forest Service office.)

3. OPEN SPACE

OBJECTIVE: To protect and enhance open space in the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Open space resources of a given site shall be protected.

2) Measures are encouraged that enhance the scenic, cultural, recreation, or natural resources of an identified open space area. Enhancement could include the following:

a) improving the usefulness of these lands as fish or wildlife habitat, including wetlands or riparian values;

b) providing additional opportunities for the enjoyment of outstanding views, and/or understanding and enjoyment of historical and archaeological sites by means which do not diminish or threaten to diminish the values of these views or sites;

c) increasing the numbers or the range of rare, threatened, endangered or sensitive species; or

d) restoration in a historically accurate manner or scientifically excavating historic structures, trails, roads and

archaeological sites, provided that any such excavations respect the religious traditions of Native Americans or other peoples whose sites are excavated.

4. COMMERCIAL DEVELOPMENT

OBJECTIVE: To insure that commercial development takes place without adversely affecting the scenic cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Special Management Areas

1) Commercial development in the Special Management Areas is inconsistent with the Act, except commercial recreation uses and services which are identified in the Recreation Assessment. Until the Recreation Assessment is completed, only those commercial recreation uses conducted outdoors without any new permanent structures may be considered consistent with the Act.

b. General Management Areas

1) Commercial developments shall protect the scenic, cultural, recreation, or natural resources of the Scenic Area.

2) Home occupations which are conducted entirely within pre-existing residences and which are incidental and subordinate to the residential use are consistent with the Act.

3) Signs which identify a commercial enterprise are consistent with the Act when compatible with the scenic, cultural, recreation and natural resurces.

5. RECREATION DEVELOPMENT

OBJECTIVE: To protect public and private recreation resources, to encourage new recreation development which will not adversely affect the Scenic Area resources and which will enhance recreation opportunities and tourism, and to preserve future options for recreation development pending completion of the Recreation Assessment and the Management Plan.

GUIDELINES

a. Both Special and General Management Areas

1) Proposals for recreation developments are encouraged to be integrated into the Recreation Assessment called for in Sections 6(a) and 8(d) of the Act.

2) Commercial recreation proposals shall meet the guidelines for commercial developments.

3) Non-commercial recreation development proposals shall protect the scenic, cultural, recreation and natural resources and shall be compatible in size and scope with the resource values of the Scenic Area. Proposals which take advantage of the unique conditions of the Gorge and which meet a demonstrated need will be given emphasis.

4) Once the Recreation Assessment required by the Act is competed, all recreation development proposals shall

demonstrate compliance with its findings and recommendations.

6. LAND DIVISIONS

OBJECTIVE: To insure that land divisions do not encourage development practices that are inconsistent with the purposes of the Act.

GUIDELINES

a. Special Management Areas

1) For lot line adjustments between neighboring properties, the seller shall maintain a 40 acre minimum lot size if there is a residence on the property.

2) Partitions and short plats are inconsistent with the Act except when the Secretary determines it is desirable to facilitate land acquisition pursuant to Section 6(d)(5) of the Act.

3) Subdivisions are inconsistent with the Act.

b. General Management Areas

1) Lot line adjustments, partitions, short plats, and subdivisions shall protect the scenic, cultural, recreation, and natural resources of the Scenic Area and must protect agricultural land, forest land and open space.

7. RESIDENTIAL DEVELOPMENT

OBJECTIVE: To insure that residential development takes place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Residential development shall incorporate design features and other considerations so that it will protect the scenic, cultural, recreation and natural resources of the Scenic Area. See Section B for design standards and opportunities for mitigation.

2) When the boundary between Special and General Management Areas divides a parcel, residential development may be consistent in either portion provided that these guidelines are met. This means that there shall be a minimum of 40 acres in the Special Management Area portion for the development to be located therein.

b. Special Management Areas

1) Residential development on a lot less than 40 acres in size is inconsistent with the Act.

2) Multi-family residential developments are inconsistent with the Act.

8. INDUSTRIAL DEVELOPMENT

OBJECTIVE: To limit new industrial development to Urban Areas and to insure that modifications to existing

industrial developments in other areas does not adversely affect the scenic, cultural, recreation, and natural resources.

GUIDELINES

a. Both Special and General Management Areas

1) New industrial development outside the Urban Areas is inconsistent with the Act.

2) A cottage industry which does not visibly alter the land or alter a structure allowed for another consistent use is not considered industrial development for purposes of these guidelines.

3) Processing of agricultural products locally grown or produced on a small scale is considered agricultural use, rather than industrial, under these guidelines.

4) Existing industrial development may be modified only to the extent it does not increase adverse effects on the scenic, cultural, recreation, or natural resources.

5) Expansion of existing industrial facilities outside of Urban Areas beyond existing dedicated sites is inconsistent with the Act.

9. MINERAL RESOURCES

OBJECTIVE: To insure that the exploration, development and production of mineral resources for the primary purpose of using the product, as well as the reclamation of lands, take place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Special Management Area

1) Disturbance of the land surface for exploration, development and production of minerals is inconsistent with the Act, except for production of sand, gravel, and crushed rock used only for roads for the production of forest products in a Special Management Area.

2) Production of sand, gravel, or crushed rock for consistent purposes shall protect the scenic, cultural, recreation and natural resources of the Scenic Area. In addition to the information required in the Application Form for a consistency determination, the applicant shall identify methods to provide for prompt stabilization and reclamation of areas disturbed by operations.

3) Production of sand, gravel, or crushed rock for consistent purposes shall be screened so it is not and will not become visible from key viewing areas.

b. General Management Areas

1) Exploration, development, or production of minerals shall protect the scenic, cultural, recreation and natural resources of the Scenic Area. In addition to the information required in the Application Form for a consistency determination, the applicant shall identify methods to provide for prompt stabilization and reclamation of areas disturbed by operations.

2) Mineral exploration, development, and production shall be screened so it is not and will not become visible from key viewing areas.

10. COMMUNITY FACILITIES

OBJECTIVE: To provide for the support of existing communities while not adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Community Facilities may be installed as needed to support existing communities and developments, as long as they protect the scenic, cultural recreation, or natural resources.

2) Development of community facilities requires documentation of the necessity for the facility to support other development and public service needs.

3) For modifications to existing utility transmission lines, the Forest Service will participate in the environmental analysis process to identify issues and to develop mitigation measures where needed to protect the scenic, cultural, recreation, and natural resources.

4) New solid waste disposal sites within the Scenic Area are inconsistent with the Act.

DEFINITIONS

The following terms used throughout the Interim Guidelines document are defined. Sources for the definition are listed.

Administrative Review: The process by which a higher official reviews a decision made by a Forest Service officer within 45 days of the decision. Regulations for this process are contained in 36 CFR 211.18.

Adversely Affect (Scenic Area Act, Section 2(a)): "A reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the Scenic Area, the determination of which is based on;

1) The context of a proposed action;

2) The intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant effects to an insignificant level."

Agricultural Land: Land used primarily for the production of farm commodities. This includes cropland truck farms, pasture, rangelands, small woodlots, Christmas tree farms, orchards, groves, vineyards, bush fruits, horticultural areas (nurseries), and feeding operations.

Agriculture Building: Structures that are necessary and accessory to an agricultural use and where there would be no need or use for the structure other than because of the agricultural use. These include: structures for storage of agricultural products and supplies, storage and maintenance of farm equipment, shelter for stock, greenhouse

dwellings for workers and/or owners, and other, similar structures related to agricultural use.

Commercial Development: Any facility or use of land or water whose function is primarily the buying or selling of goods or services or both.

Commercial Recreation: Any private (non-governmental) recreational activity or facility for which a fee is charged.

Community Facilities: Basic utilities and services necessary to support development and public service needs, including but not necessarily limited to: water utilities, sanitation facilities, microwave relay stations, communications facilities, local power distribution lines, schools, roads and highways.

Cottage Industry: A manufacturing business operated in a residence or related major structure owned and operated by the full-time residents on the premises when under county permit and with no more than three outside employees.

Cultural Resources: Physical evidence of sites, structures, or objects used by humans and the conceptual content or context of an area (as a setting for legendary, historic, or prehistoric events, or a sacred area of native peoples, etc.). Historic landscapes, such as agricultural patterns, are also considered cultural resources. Four categories of resources will be used for inventory and evaluation purposes:

1) archeological--resource values associated with former occupancy by native cultural groups;

2) historical—values dating from first occupancy by non-native settlers;

3) relic cultural groups—resource values associated with the existence of native people who continue to live in groups practicing the cultural life styles of their ancestors; and

4) recent in origin—outstanding examples of contemporary culture representing achievements which, in the future, are likely to become historically significant.

Cultural Resource Inventory: The formal process of collecting existing information on known cultural resources and locating, through field survey conducted by trained personnel, and documenting as yet undiscovered cultural resources.

Forest Lands: Lands used for growing forest products.

Home Occupation: Any occupation or profession carried on entirely within a residence or major related structure by a member of the family residing in the dwelling and carried on under County permit. This includes bed and breakfast facilities and commercial guide services.

Industrial Facilities or Land Uses: In general, any facility or land use primarily involved in:

1) Assembly or manufacture of goods or products.

2) Processing or reprocessing of raw materials, processing of recyclable materials or non-locally produced agricultural products;

3) Storage or warehousing, handling or distribution of manufactured goods or products, raw materials, agricultural products or recyclable materials for purposes other than retail sale and service; or

4) Production of hydro-electric power for commercial purposes.

Key Viewing Areas: Areas from which large numbers of people view the National Scenic Area portions of the Gorge. These include:

Historic Columbia River Highway
Crown Point
Highway I-84, including rest stops
Multnomah Falls
State Route 14
Beacon Rock
Highway 35 at Panorama Point
Cape Horn
Highway 197
Dog Mountain Trail
Cook Underwood Road
Rowena Plateau
Railroads on both sides of the River
Sciorsus Park
Portland Women's Forum State Park
Seven Mile Hill
Bridal Veil State Park
Larch Mountain
Beacon Rock State Park
Rooster Rock State Park
Bonneville Dam Visitor Centers
Columbia River

Land Forms: Cliffs, talus slopes, unusual rock formations, geologic features, sand dunes.

Landscape Settings:

Developed Setting: Residential, commercial, or industrial complexes are dominant in the landscape. Setting may include rural towns, large commercial or industrial developments, subdivisions, etc.

Rural Setting: Forest, range or agricultural land that is predominately vegetated, but which may have considerable evidence of human occupation such as structures, roads and fields. Structures appear scattered or in small dominant clusters.

Undeveloped Setting: Generally forest or grasslands of moderate to large size in a near-natural condition. Structures or developed features other than roads are rare and isolated.

Livestock Feedlot: Large facility for commercial feeding of livestock, specifically for the purpose of fattening for market. Does not include seasonal feeding of livestock on farms and ranches.

Lot or Parcel: A contiguous unit of land under a single ownership created by a partition, short plat or subdivision in accordance with the applicable state law and local regulations.

Lot Line Adjustment: The transfer of a portion of a lot from one owner to the owner of an adjacent lot resulting in no increase in the number of lots.

Major Development Action: (Scenic Area Act, Section 2(j)): "Any of the following:

1) subdivisions, partitions and short plat proposals;

2) any permit for siting or construction outside Urban Areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

3) exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the Special Management Areas used for the production of forest products; and

4) permits for siting or construction within a Special Management Area of any residence or other related major structure on any parcel of land less than forty acres in size."

Mineral Resources: A concentration of naturally occurring solid, liquid, or gaseous material in such form and amount that is locatable or leasible under the mining laws of the United States, or is common variety such as sand, gravel and rock. Minerals include: metalliferous and nonmetalliferous material, oil and gas, and geothermal resources.

Mitigation: (from 40 CFR 1508.20) Mitigation includes the following:

1) Avoiding the impact altogether by not taking a certain action or parts of an action;

2) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; or

4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Natural Resources: Naturally occurring features including land, water, air, plants, animals including fish, and plant and animal habitat that exist within the Scenic Area.

Open Space: (Scenic Area Act, Section 2(l)):

"Unimproved area that is not agricultural or forest land and that is designated as open space as provided in Section 6(d) of this Act. According to that section, open spaces include:

1) Scenic, cultural, and historic areas;

2) Fish and wildlife habitat;

3) Land which support plant species that are endemic to the Scenic Area or which are listed as rare, threatened or endangered species pursuant to State or Federal Endangered Species Acts;

4) Ecologically and scientifically significant natural areas;

5) Outstanding scenic views and sites;

6) Water areas and wetlands;

7) Archaeological sites, Indian burial grounds and village sites, historic trails and roads and other areas which are culturally or historically significant;

8) Potential and existing recreation resources; and

9) Federal and State wild, scenic, and recreation waterways."

Partial Retention Visual Quality Objective: Land uses and structures may be visible from key viewing areas but must remain visually subordinate to the surrounding natural landscape. Visual characteristics of form, line, color and texture of land uses and structures must remain subordinate to, and have low contrast with, the surrounding natural landscape.

Partition: The creation of two or three lots in accordance with Oregon State statute. Applies only to developments in Oregon.

Recreation Assessment: Analysis of existing and potential recreational opportunities, needs, and potentials as required by Sections 6(a)(3) and 8(d) of the Scenic Area Act.

Recreation Development: Facilities designed to complement, enhance or support a recreational activity or experience. These include but are not limited to campgrounds and picnic areas, recreation vehicle parks, swimming, boating or windsurfing facilities, hiking trails, etc.

Recreation Resources: The leisure time or recreation activity, setting, or experience opportunities that exist in the Scenic Area. For purposes of these guidelines, particular emphasis is given to opportunities that depend on the landscape, natural resources, or conditions which are specific to the Scenic Area.

Residential Development: (Scenic Area Act, Section 2(n)): "Permitting for siting or construction of any residence or other related major structure." Related Major

Structure is any detached structure which is accessory to a residence.

Retention Visual Quality Objective: Land uses and structures are not readily visible from key viewing areas. Land uses and structures are visually consistent with the characteristic form, line, color, and texture of the surrounding natural landscape.

Scenic Resources: The inherent visual quality (appearance and character of the landscape) of the area and its degree of naturalness, and/or the attractiveness of the cultural features.

Short Plat: The creation of two to four lots in accordance with Washington State Statute. Applies only to developments in Washington.

Solid Waste Disposal Site: A site dedicated to the disposal of waste products. May include household waste, yard debris, and/or chemical or industrial wastes. Does not include transfer stations or recycling plants.

Subdivision: The creation of four or more lots in Oregon and five or more lots in Washington in accordance with each state's statute.

Threatened and Endangered Species: Those species whose prospects of survival and reproduction are in immediate jeopardy or are likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of their ranges. These species are listed in 50 CFR 17.11 and 17.12, dated January 1, 1986, published by USDI Fish and Wildlife Service.

Wetlands: Those areas that are inundated or saturated by surface or ground water at a frequency and duration

sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include marshes, swamps, bogs, and similar areas.

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OCTOBER TERM, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to the Columbia River Gorge National Scenic Area Act, 16 U.S.C. 544 *et seq.*, Congress granted its consent to an interstate compact between the States of Washington and Oregon, subject to the condition that the States form a commission in accordance with a prescribed regulatory framework to address land. management issues within the Columbia River Gorge Scenic Area. The question presented is whether the Act is within the scope of Congress's powers under Articles I and IV of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-52

COLUMBIA GORGE UNITED — PROTECTING PEOPLE AND PROPERTY, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 960 F.2d 110. The opinion of the district court (Pet. App. B1-B31) is reported at 20 Envtl. L. Rep. (Envtl. L. Inst.) 21,162.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1992. The petition for a writ of certiorari was filed on June 29, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Columbia River forms much of the border between Washington and Oregon. East of Portland, the Columbia River passes through the Columbia River Gorge, an area known for its outstanding scenery, outdoor recreational opportunities, and other amenities. The lands within the Gorge are owned by private entities, state and local governments, and the United States. To "protect and provide for the enhancement of the * * * resources" of the area, 16 U.S.C. 544a(1), and "to protect and support the economy of the Columbia River Gorge area," Section 544a(2), Congress enacted the Columbia River Gorge National Scenic Area Act (the Act), 16 U.S.C. 544 *et seq.* To achieve those ends, the Act sought to "establish a partnership between the Federal Government, the States of Oregon and Washington, and the nearly 50 units of local government within the Columbia Gorge for the purpose of protecting and enhancing" the Gorge resources through a scheme of coordinated planning and cooperative management.[1]

Although the Secretary of Agriculture is responsible for administering federal lands within certain "special management areas" described in Section 544b(b), see Section 544f(a), the Act generally contemplates that lands in the scenic area will be administered by the Columbia River Gorge Commission, which was to be formed pursuant to a compact between the States of Washington and Oregon. Congress consented to such a compact in Section 544c(a)(1), subject to the condition that the compact establish the Commission in accordance with the provisions of the Act. The Act did not require the States to pass the compact,[2] but did provide

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[1] 132 Cong. Rec. 29,496 (1986) (remarks of Sen. Hatfield).

[2] Section 544o(d) makes this clear:

that if the States did not pass such a compact, the Secretary would "not be obligated to take actions which are predicated upon the establishment of the Commission." Section 544o(e).[3]

The Commission consists of 13 members: one appointed by each of the six counties in the scenic area, three appointed by each of the two Governors, and a nonvoting member who is a Forest Service employee, appointed by the Secretary. Section 544c(a)(1)(C). The Act obligated the Commission to complete an inventory and assessment of the scenic area within its first year, Section 544d(a), develop land use designations for non-federal lands in the scenic area within the second year, Section 544d(b), and adopt a land management plan within the third year, Section 544d(c). The plan must include land use designations, as well as guidelines for the adoption of land use ordinances for the scenic area. Section 544d(c).[4] The plan is to be submitted to the Secretary for his approval, but the Commission may override any objection by a two-thirds vote. Section 544d(f). After the plan is adopted, the Commission administers the nonfederal lands in the scenic area under the plan, reviewing land use ordinances to ensure that they are consistent with

---

Mandatory language in sections 544 to 544p of this title respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title.

[3] Oregon and Washington entered into the compact in 1987. See Or. Rev. Stat. § 196.150 (1989); Wash. Rev. Code Ann. § 43.97.015 (Supp. 1992).

[4] The plan must incorporate without change the directions for use of federal lands promulgated by the Secretary. See Sections 544d(c)(4), 544d(c)(5)(A). The guidelines for land use ordinances do not apply within certain "urban areas" described in Section 544b(e), see Section 544d(c)(5)(B).

the plan; if a county fails to submit a satisfactory land use ordinance, the Commission will promulgate a land use ordinance directly. Section 544e.[5]

Finally, pending adoption of the guidelines and land use ordinances described above, Section 554h(a) provides that the scenic area (except for urban areas) shall be administered in accordance with interim guidelines adopted by the Secretary. Major developments during that period shall be permitted by the Commission "only if it determines that such development is consistent with the standards contained in [the Act]." Section 544h(c).

2. Petitioner and others commenced this action against the Secretary of Agriculture and the Columbia River Gorge Commission, claiming that the Act is unconstitutional because it exceeds the scope of Congress's powers under Articles I and IV of the Constitution. The district court ruled for respondents. Pet. App. B1-B31. The court rejected petitioner's claim that the Act violated the Tenth Amendment, explaining that the States, by passage of the compact, had agreed to the imposition of the land use regulations required by the Act. Pet. App. B13-B14. The court also held (*id.* at B15-B18) that the Act is within Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3, because the "legislative record supports a finding that the establishment of a national scenic area affects interstate commerce," both by en-

[5] The Act establishes different procedures for lands within the special management areas. Land use ordinances that the Commission approves for those areas must be submitted to the Secretary for review. Sections 544f(i)(3), 544f(j). If the county does not wish to accede to any suggested revisions of the Secretary, the Commission may issue an ordinance itself or override the Secretary's disapproval by a two-thirds vote. Section 544f(k), 544f(*l*). In that case, however, the county would not be eligible for the federal funds appropriated for payments to local governments under the Act. Section 544f(n); see Sections 544n(a)(2), 544n(b).

couraging tourism and by regulating other industries in the area. Pet. App. B16. Similarly, the court concluded (*id.* at B18-B19) that the Act is within Congress's power under the Property Clause, Art. IV, § 3, Cl. 2. Finally, the court rejected (Pet. App. B19-B21) petitioner's argument that the compact was invalid because it was based on coercion of Oregon and Washington. Noting that "[t]he states were free to reject the conditions of the Compact," the court concluded that the compact was valid and not the result of coercion. *Id.* at B21.

3. The court of appeals affirmed. Pet. App. A1-A11. The court ruled (*id.* at A6-A7) that the Act was authorized by the Commerce Clause based on Congress's "desire to preserve the beauty of the area for those who would travel to use the [amenities] in it," and Congress's desire to "regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce," noting the important logging and fishing industries in the region. *Id.* at A6. Accordingly, the court had no occasion to consider whether the Property Clause afforded an independent basis for the Act. *Id.* at A7-A8. The court then rejected petitioner's argument that the Act violates the Tenth Amendment, explaining that "the Act is within the powers granted to Congress under the Commerce Clause" and thus "cannot constitute an exercise of a power reserved to the states." Pet. App. A8. Finally, the court rejected (*id.* at A8-A10) petitioner's contention that the specific regulatory framework set forth in the Act as a condition to the compact rendered the compact invalid as the product of improper coercion. The court explained: "Congress may condition consent upon a compact containing specific terms, including the creation of a compact agency." *Id.* at A9.

ARGUMENT

1. Petitioner first argues (Pet. 9-18) that the Act exceeds the authority granted to Congress by the Commerce Clause because the Act has an insufficient connection with interstate commerce. That claim plainly is meritless. As this Court has explained, the federal judiciary is limited to a "relatively narrow" inquiry in reviewing Congress's judgment that the Commerce Clause justifies a particular enactment; such enactments are within the reach of the Commerce Clause if there is "any rational basis" supporting Congress's view that the "regulated activity affects interstate commerce." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981).

Section 544a recites that the purposes of the Act are to "provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge," and to "protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas."[6] In light of the substantial evidence before Congress of the existing and potential tourism opportunities in the area, as well as the timber and fishing industries that potentially conflicted with preservation of the pristine scenery (see

[6] Because these provisions of the Act plainly invoke Congress's commerce power, petitioner's statement (Pet. 13) that courts should be "reluctant to hypothesize constitutional justifications for statutes where Congress provides no legitimate and clear statement of purpose" misses the mark. In any event, whether or not Congress intended to rely on the Commerce Clause, the Act must be upheld if it is within the power granted by the Commerce Clause, because "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983), quoting *Woods* v. *Cloyd W. Miller Co.*, 353 U.S. 138, 144 (1948).

Pet. App. B16-B17), it was indisputably rational—if not obviously correct—for Congress to conclude that establishment of the scenic area would affect interstate commerce.

2. Petitioner also argues (Pet. 18-25) that the Act violates principles of federalism reflected in the Tenth Amendment and the Guarantee Clause, Art. IV, § 4. We disagree. The statute neither intrudes into areas of state sovereignty beyond the reach of the Commerce Clause, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), nor commandeers the States' processes by "mandating state regulation," *New York* v. *United States*, 112 S. Ct. 2408, 2430-2431 (1992). First, there can be no plausible argument that the statute is invalid on the basis of the concerns addressed in *Garcia*. Other States did not circumvent "internal safeguards of the political process" to force the Act on two unwilling States, see *Garcia*, 469 U.S. at 556. Rather, the statute was enacted by Congress for the benefit of these two States, and became effective only upon the exercise by those States of their sovereign, constitutionally recognized authority to consent to a compact implementing the Act.

Similarly, the statute bears no resemblance to the statutory provision *invalidated* in *New York*, principally because the statute does not obligate the States to do anything, much less enact a regulatory scheme that Congress could not have enacted directly. Rather, like the provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 *upheld* in *New York*, the statute offers the two States significant benefits—the security of knowing that the entire area will be developed coherently, coupled with specific federal grants under Section 544n—upon the States' compliance with specified conditions. Compare *New York*, 112 S. Ct.

at 2425-2427.[7] If the States had chosen not to enter into a compact in accordance with the Act, the sole result would have been that "the Secretary shall not be obligated to take actions which are predicated upon the establishment of the Commission," Section 544o(e).

3. Finally,[8] petitioner argues (Pet. 27-29) that the Act cannot be sustained under the Compact Clause, Art. I, § 10, Cl. 3. This argument reflects a misunderstanding of the relevance of the Compact Clause. The government has not contended that the Compact Clause grants Congress the authority to pass the Act; it has contended that the compact entered into by Washington and Oregon is valid because the Act granting Congress's consent is a valid exercise of congressional power under the Commerce and Compact Clauses.

To the extent petitioner suggests that Congress did not properly act because "the states had *nothing* to do with [the Act's] detail," Pet. 27, it errs. The Compact Clause places no procedural limitations upon the manner by which Congress may grant its consent to interstate compacts. Accordingly, as this Court has held, Congress may consent to an interstate compact by authorizing

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[7] Hence, *New York* makes clear that petitioner's reliance on the "substantial grant moneys" available under the Act (see Pet. 22-23) to establish that "[t]he states had absolutely no choice but to surrender to the Act" is inadequate to show that the Act transgresses constitutional limits on congressional power. See 112 S. Ct. at 2426 (relying on, *inter alia*, *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

[8] Petitioner also argues (Pet. 25-27) that the statute cannot be sustained as an exercise of Congress's power under the Property Clause. Because the court of appeals had no occasion to consider that question, see Pet. App. A8, it is not a proper subject for certiorari, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), although it would serve as an alternative ground for affirming the judgment of the court of appeals, see *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

joint state action in advance of the enactment of state legislation and the federal legislature may condition its consent upon the States' compliance with specified terms. *Cuyler* v. *Adams*, 449 U.S. 433, 439-441 (1981). Petitioner suggests no reason why the specificity with which Congress sets forth the conditions of its consent should be relevant to the constitutional analysis. Moreover, any lack of state involvement in development of the precise terms of the compact is irrelevant. The only requirements for a compact to bind a State are that Congress approve it and that the State enact it; the Constitution does not address the question of who drafts the document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-52

In The

Supreme Court of the United States

October Term, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE DEFENDANT-INTERVENOR, FRIENDS OF THE COLUMBIA RIVER GORGE, INC., IN OPPOSITION

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QUESTION PRESENTED

Pursuant to the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544 *et seq.*, Congress granted its consent to an interstate compact between the States of Washington and Oregon, subject to the condition that the States form a commission in accordance with a prescribed regulatory framework to address land management issues within the Columbia River Gorge Scenic Area. The question presented is whether the Act is within the scope of Congress's powers under Articles I and IV of the Constitution.

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JURISDICTION

The judgment of the court of appeals was entered on March 30, 1992. The petition for a writ of certiorari was filed on June 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Defendant-Intervenor, Friends of the Columbia River Gorge, Inc. (the "Friends"), adopts the Statements of the Federal and State Respondents in their briefs in opposition.

ARGUMENT

The Friends urge the Court to deny plaintiffs' petition for a writ of certiorari for the reasons set forth in the briefs of the Federal and State Respondents in their briefs in opposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1991

COLUMBIA GORGE UNITED — PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD MADIGAN, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE

Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Respondent Gorge Commission accepts the statement of the question presented as framed by the federal respondent.

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STATEMENT OF THE CASE

Respondent Gorge Commission adopts and incorporates by reference the Statement of the Case set forth in the brief of the federal respondent and supplements section 1 of that statement below.

I. The Setting of the Columbia River Gorge

The Columbia River Gorge is a unique resource of unquestioned national, regional and local significance. The Gorge was created over two million years ago and is over one mile deep. The Columbia River forms the boundary between Oregon and Washington for a portion of its length and is the largest river in the country that flows into the Pacific Ocean. The explorers Lewis and Clark described with awe the area's monumental rock formations and scenic beauty during their famous expedition throughout the Gorge in 1805.[1] 99 Congr. Rec., H 11121 (Oct. 16, 1986).

The geology of the Gorge has created a diversity of habitat for vegetation and wildlife. It is home to rare as well as wild and endangered animal species, including the pine marten and western gray squirrel. Falcons, bald and golden eagles, swans and great blue heron soar over the promontories of this spectacular habitat. Over 800 wildflower species, some endangered and some found nowhere else, bloom in colorful abundance. Vast forests in the western end of the Gorge are juxtaposed against golden, wheat colored hills rising in the east.

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[1] A more recent observer aptly summarized the special nature of the area:

> The beauty of this spectacular canyon is breathtaking. Waterfalls cling to mountainsides. Giant cliffs and rocks stand out as sentinels against the wind and rain. The great Columbia River moves silently and smoothly toward its destined meeting with the Pacific Ocean. The peaks of Mount St. Helens, Mount Adams, and Mount Hood loom as reminders of the fiery prehistoric past.

Senator Daniel Evans, 99 Cong. Rec. S15642 (Oct. 8, 1986).

Significant cultural resources are found along both sides of the Columbia River. Over four hundred recorded, prehistoric archaeological sites document human occupation from centuries past and attest to the area's importance to the Native Americans who have inhabited the area for 10,000 to 20,000 years. Of these sites, slightly over half are on private, county, state and non-Forest Service federal lands. The remainder are within the Gifford Pinchot National Forest.

Native Americans continue to maintain their cultural identity within the Gorge. Commercial, subsistence and ceremonial fishing rights are reserved by the tribes under the treaties of 1855.

The Gorge economy is diverse, consisting principally of forest products, manufacturing, agriculture, tourism, and government. In addition, the Columbia River and its tributaries support substantial fisheries at all times of the year. The Gorge annually attracts millions of visitors, many of whom fish, hike, raft, windsurf or simply explore the area using in part the treasured National Scenic Highway recently included in the National Register of Historic Places.

II. The Need For Regional Planning in the Gorge

Economic activity and associated land uses in the Gorge often both enhance and conflict with the aesthetic beauty of the area. Standing forests, for example, add to the beauty of the area, thus encouraging tourism. Forests also provide timber, which enhances the area's economy too, but only when harvested, often by unsightly clearcutting. Bonneville Dam attracts millions of visitors annually and is a mainstay of the tourism economy, yet visually it is a blight on the Gorge's aesthetic, geologic beauty. Fishermen object to timber practices that cause siltation and harm spawning tributaries. Windsurfers on the Columbia River

complain of large grain barges, and Indian fishermen are at odds with windsurfers, whose boards tear their fishing nets.

Residential and commercial developments add further to the area's conflicts. Developments outside urban areas have eroded the natural beauty of the Gorge area even while providing economic benefits. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis And Legislative History*, 17 ENV'T L. REV. 863, 874-78 (1987).

Added to the strain caused by the tension between maintaining the area's aesthetic beauty and enhancing economic activities and development is the Gorge area's political diversity. Oregon and Washington share overall political responsibility for the Gorge. In addition, six counties, nine cities, seven ports and twenty-six other entities, including federal and state agencies, all exert control over discrete parts of the Gorge area.

In recent years, as both states confronted problems of growth in conjunction with economic development, regional planning received renewed impetus. Over the past two decades, Oregon and Washington enacted new laws to protect coastal resources, water, forests, fish, wildlife, cultural and archaeological resources and environmental quality in general. Natural resources in the Gorge, however, presented unique difficulties due to the diffusion of regulatory authority and the increased pressure for residential, commercial and industrial development. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

III. The Development of State and Federal Legislation

Efforts to manage the unique aspects of the Columbia River Gorge area date back to 1893, when Congress created the Cascade Range Forest Reserve, which later became the Mount Hood National Forest. In 1937, the Pacific Northwest Regional Planning Commission considered creating an interstate park, in

recognition of the Gorge's national significance. During the 1950's, both Oregon and Washington created Gorge commissions, but they were ineffective due to lack of funding as well as opposition by special interest groups.

By the early 1980's, Northwest policy leaders began calling for a better, more comprehensive approach to protecting the Gorge. Congressional leaders from both states explored several approaches to joint management of the area. In his inaugural address to the Sixty-second Oregon Legislative Assembly on January 10, 1983, Oregon Governor Atiyeh pledged his efforts to achieve protection for the Gorge.

> When Governor Oswald West declared Oregon's beaches a public right-of-way in 1913, his vision preserved a heritage we treasure today. When Governor Tom McCall took heroic steps to begin our state land use program; and Governor Bob Straub won priceless miles for the Willamette River Greenway; their vision created a heritage our children will enjoy.
>
> Before I leave office as Governor of Oregon, I in turn want to see our unmatched Columbia River Gorge preserved and protected for future generations. Like goals of the past, my vision too will require dedication, hard work and the concerned commitment of many Oregonians.

Shortly thereafter, Governor Atiyeh and Governor Spellman of Washington reached agreement on the need for federal legislation to assist the states' efforts to protect the Gorge.

In the beginning, the proposals ranged from full federal regulation of land uses in the Gorge to bi-state control with no federal involvement. During the extensive debates on these proposals between 1982 and 1986, state and federal public officials considered the views of thousands of Gorge residents and other interested citizens. Over time, support solidified in favor of a

partnership of federal, state and local regulation with primary responsibility for control based on the nature of the area within which the land use activity would take place.

Under this format, regulation in urban areas would be the responsibility of state and local officials. Intense development already had occurred in these areas, and further development was viewed as necessary and desirable for the economic health of the Gorge. In contrast, policies for regulation of areas viewed as particularly sensitive or threatened by development would be the primary responsibility of the federal government, which is the dominant landowner in these areas.[2] Finally, policies for regulating the remaining areas would be developed by a bi-state commission whose membership would be chosen by the states' governors and the six counties in the area.

From this consensus and after years of negotiations, the Columbia River Gorge National Scenic Area Act ("Scenic Act" or "Act") was created. 16 U.S.C. § 544, *et seq.* (1986).[3] Congress approved the Act on October 17, 1986. President Reagan signed the Scenic Act on November 17, 1986.

IV. The Structure of the National Scenic Area Act

A. Overview

Congress determined that the purposes of the National Scenic Act are two-fold: first, "to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural,

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[2] In the particularly sensitive areas, designated by the Scenic Act as "special management areas," the federal government is the primary landowner, owning 37.5% of the land.

[3] Although 90% of the land on the Washington side is in private ownership, the legislation was supported by all of Washington's Congressmen and Senators. 99 Congr. Rec., H 10468 (Oct. 16, 1986). All but two members of Oregon's delegation (Representatives Denny Smith and Bob Smith) endorsed the Act. 99 Congr. Rec., H 10466 (Oct. 16, 1986).

recreational, natural resources of the Gorge"; second, to protect and support the Gorge economy. § 544a. To accomplish these purposes, the Scenic Act has three main features. First, it designates a specified portion of the Columbia River Gorge as a National Scenic Area[4] and divides the region into three categories: (1) urban areas, the regulation of which is exempt under the Scenic Act; (2) special management areas; and (3) the remainder, generally referred to as general management areas. § 544b.[5]

Second, the Act contains Congress's advance consent to an agreement between Oregon and Washington by which the two states could create a bi-state commission with regulatory responsibility over natural resources and land use within the Scenic Area. § 544c. As a condition to its consent, Congress required, inter alia, that the Columbia River Gorge Commission carry out its powers and duties in accordance with specified terms of the Act, and that the states vest in the Commission and its members the powers necessary to enable the Act to be carried out. *Id.*

Third, the Act vests in the Secretary of Agriculture specified regulatory powers and responsibilities. Some of these powers and responsibilities assume that the states will agree to form the bi-state commission. For example, that assumption is inherent in the requirement that the Secretary review and approve the Commission's management plan for the scenic area. § 544d(f).

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[4] The Scenic Area lies to the east of Portland, Oregon and Vancouver, Washington. It extends 80 miles along the Columbia River, stretching from the Sandy River on the west to the Deschutes River on the east. The Scenic Area covers portions of six counties: Clark, Skamania and Klickitat Counties in Washington, and Multnomah, Hood River and Wasco Counties in Oregon.

[5] The urban areas include 13,000 acres, the special management areas 112,000 acres and the general management areas 113,000 acres. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

Congress conferred on the Secretary other powers and responsibilities, however, regardless whether the states agreed to the formation of a bi-state commission. Thus, within the special management areas, where the federal government is the principal landowner, Congress required the Secretary to manage federal lands; to inventory resources and assess the area's recreational opportunities; and to develop land use designations and guidelines for land use ordinances so that non-federal lands would be managed consistent with the Scenic Act. Congress further required the Secretary to adopt interim guidelines for the entire scenic area which would apply until adoption of the management plan and would identify land use activities inconsistent with the Act. § 544h.

B. The Columbia River Gorge Commission

The Scenic Act specifies the composition of the Gorge Commission, with six members appointed by the governors and six members appointed by the counties. The Secretary of Agriculture is designated as a non-voting member of the Commission. § 544c(a)(1).

The Act requires the Commission to complete several studies, including a resource inventory, an economic opportunity study and a recreational assessment for the entire Scenic Area incorporating the Secretary's studies for the special management areas (SMA's). § 544d(a). Next, the Act requires the Commission to develop land use designations for the use of non-federal lands outside SMA's. The Commission must designate lands suitable for agriculture, forest and open space use; designate lands outside SMA's suitable for commercial development; and designate areas suitable for resource development. § 544d(b).

As the next step in the planning process, the Commission must adopt a management plan for the entire Scenic Area. The

Act sets forth the general standards the Commission must apply in preparing the plan. The plan must include provisions for protecting natural resources (agricultural lands, forest lands, open space) as well as recreational and educational resources; prohibiting major development actions within special management areas; prohibiting industrial development outside urban areas; and requiring that commercial and residential development outside urban areas not adversely affect the scenic, cultural, recreational and natural resources. § 544d(d)(1)-(9). The Plan must contain land use designations as well as guidelines to be followed by counties in adopting actual zoning ordinances. § 544d(c). During the interim prior to adoption of the Plan, the Commission has responsibility to review and approve all major actions and residential development proposals for consistency with the Act and with the interim guidelines adopted by the Secretary. § 544h(c).[6]

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[6] While the Secretary may disapprove the management plan based on disagreement with the Commission's planning in the general management areas, the Commission has authority to override the Secretary's disapproval. § 544d(f).

The Act contains other miscellaneous, yet important, provisions as follows:

(1) The Secretary is empowered under certain circumstances to acquire undeveloped lands within SMA's using the power of eminent domain. § 544g.

(2) Each state is authorized to develop economic development plans and to be entitled upon certification of the management plan to receive federal grant money for economic development projects within counties with ordinances which the Secretary has approved. § 544i.

(3) The Oregon Department of Transportation is authorized to prepare a program and undertake efforts to preserve and restore the Old Columbia River Highway for public use as a Historic Road, for which it will receive federal funds. § 544j.

(continued...)

C. County Zoning Ordinances

After the commission adopts the management plan, the Act calls for county governments to adopt zoning ordinances to implement the Plan. § 544e. The Commission retains exclusive authority to approve county ordinances for the general management areas. Commission approval of ordinances for special management areas, however, is subject to Secretary concurrence. § 544f. If the Secretary does not concur in a county ordinance for a special management area, the Commission retains the right to override the Secretary's judgment. However, the county faces the loss of federal economic development funds and the threat of federal acquisition of private lands if it fails to obtain the Secretary's acceptance. § 544n.

V. State Ratification

In 1987, both Oregon and Washington enacted legislation incorporating the Scenic Act and forming a compact between the two states to create the Columbia River Gorge Commission. Or. Rev. Stat. § 196.150 (Or. Laws 1987, ch. 14, section 1); Wash. Rev. Code § 43.97.020. During May and June of 1987, the Governors of Oregon and Washington, and county commissioners within the Scenic Area, appointed 12 voting members to the Commission.

The Compact grants to the Gorge Commission the powers necessary to enable it to carry out the duties specified in the

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[6](...continued)

(4) Certain rivers and streams within the scenic area are subjected to the same restrictions on licensing, permitting and exemptions as for rivers in the National Wild and Scenic Rivers systems. § 544k.

(5) Compliance with the Act, interim guidelines, management plan and ordinances within SMA's can be enforced in judicial proceedings brought by the Secretary and by the Commission and citizens in all areas. § 544m.

Scenic Act. Thus, the Compact empowers the Commission to disapprove county land use ordinances if they are inconsistent with the management plan (Article I.a.2.); to enact land use ordinances for any county that declines to enact ordinances consistent with the management plan (Article I.a.3.); and to review and approve or disapprove all proposals for major development action and new residential development within the Scenic Area outside urban areas (Article I.a.4.).

The Compact further specifies the composition of the Commission and requires each state governor and the counties within the scenic area to appoint members as required in the Scenic Act. (Article II). The Compact provides for funding the Commission. (Article IV). Finally, the compact contains a severability clause stating that the invalidity of any portion of the Compact shall not affect the validity of the remaining severable provisions. (Article V).

ARGUMENT

Petitioner fails to show that this case is of sufficient importance that it merits this Court's review.

As a preliminary matter, this case is not about whether government has tread too heavily with land use regulation and effected a taking of private property. Rather, this case is solely about whether the state and federal governments, in cooperatively developing and implementing a comprehensive planning program and process to protect and enhance both the economic and aesthetic resources of a two-million year old national treasure, have properly divided among themselves that responsibility.

The Ninth Circuit Court of Appeals upheld the federal government's role under the Scenic Act on Commerce Clause grounds. It further rejected petitioner's contentions that Congress overstepped its bounds under the Compact Clause and the Tenth

Amendment.[7] Whether this Court reviews and ultimately disagrees with the Ninth Circuit's analysis in this case is of minor practical consequence. The Columbia Gorge Scenic Act is not invalid in its entirety. At a minimum, given the Act's severability clause, Congress's consent to Oregon's and Washington's formation of a bi-state compact and commission to oversee land use development in the Columbia Gorge is valid; the states have lawfully entered into the compact, thus forming the Gorge Commission and empowering it with broad, regulatory land use responsibilities, including adoption of a regional management plan; and the Commission has now adopted the regional management plan. It is simply too late in the day to grant petitioner its wish and turn back the clock to the time when land use planning in the Gorge was purely a local affair. Thus, even if this Court were to agree with petitioner that the Ninth Circuit misapplied Commerce Clause, Tenth Amendment and Compact Clause jurisprudence in upholding the federal government's involvement in protecting and enhancing the scenic, recreational and economic resources of the Columbia River Gorge, the Court's decision would have little effect on the regulatory actions and authority of

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[7] The Ninth Circuit also rejected petitioner's argument "that the regulatory system is a product of a compact that is not valid under the Compact Clause." Pet. App. A-8. The court concluded that under *Cuyler v. Adams*, 449 U.S. 433, 440–41 (1981), Congress clearly could give advance consent to the formation of a compact, and that the consent given here — although imbued with several conditions specifying the content and detail of the compact — satisfied the purpose of the Compact Clause, which is to permit states and the federal government to work together to formulate innovative solutions to complex problems concerning both state and federal interests. The court then rejected petitioner's argument that Congress's consent to the compact, and hence the compact itself, was invalid. Given the court's conclusion that the conditions Congress attached to its consent were valid, the court did not decide whether, given the Act's severability clause, Congress's consent to the compact would remain if the conditions were invalid.

Oregon and Washington and of the bi-state commission they have created.

Nor is there any merit to petitioner's claim that the Tenth Amendment and the Compact Clause do not permit the type of federal-state cooperation reflected in the Scenic Act. Petitioner distorts the legislative record when it claims that the Scenic Act was other than a product of voluntary, state and federal cooperation. No legitimate claim can be made that the political process failed or that the federal government somehow commandeered the states to achieve federal interests.

Even if the correctness of the Ninth Circuit's decision were to have practical importance and even if the decision were incorrect, petitioner fails to justify why the decision merits certiorari review. Petitioner does not show that the Ninth Circuit's analysis conflicts with that of any other circuit. Nor does petitioner demonstrate that the decision is inconsistent with this Court's recent decisions such that this Court should grant certiorari in the exercise of its supervisory powers over the lower federal courts.

I. The correctness of the Ninth Circuit's analysis is of minor regional or local consequence.

Petitioner argues that the federal government lacks enumerated power to have a direct role in land use planning on other than federal lands in the Columbia Gorge because land use planning is of purely local concern. Petitioner further argues that Congress is required, but has failed, to disclose in the Scenic Act the basis for concluding its involvement was necessary in the interests of interstate commerce. Petitioner contends also that the Compact Clause prohibits two states from cooperatively soliciting and utilizing the assistance of the federal government in developing a solution to land use problems of common concern which

neither state alone can master, at least if the federal government attaches specific conditions to its consent to the solution.

Petitioner, however, does not ask this Court, nor did it ask the courts below, to parse out and declare invalid just those Scenic Act provisions detailing the federal government's involvement in protecting the economic and aesthetic resources of the Columbia Gorge. Rather, petitioner seeks to have the Court discard the whole program: the entire Scenic Act, the compact between Oregon and Washington and the bi-state Columbia River Gorge Commission which both states legislatively have charged with specific regional land use powers and responsibilities. In declining to limit its challenge to discrete portions of the Act, petitioner reveals that it is not merely concerned with federal encroachment on land use planning but with any state involvement in what it views to be a purely local government activity.

This Court cannot provide petitioner the relief that it seeks. Whether the Ninth Circuit's analysis in this case is correct, the compact between Oregon and Washington is valid and the Gorge Commission is lawfully constituted and empowered with regional land use planning authority within the Gorge Scenic Area. In § 544c(a) of the Act, Congress gave its advance consent to the formation of a bi-state compact and commission:

> (1) To achieve the purposes of this Act and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in this Act pursuant to which, within one year after the date of enactment of this Act —
>
> (A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, * * *

Petitioner argues that this advance consent is invalid because Congress attached impermissible, specific conditions to its consent. Even if the conditions were impermissible, however, Congress's consent remains valid. Petitioner neglects to mention that the Scenic Act contains an express severability provision. § 544p. That provision states that if any of the Act's provisions are declared invalid, the remaining portions are not affected. Thus, even assuming Congress lacked authority to condition in any manner its consent to the formation of the compact and the Columbia Gorge Commission, its consent would be severable from those conditions. It follows then, that the bi-state compact is not invalid nor is the Gorge Commission unlawful for lack of Congressional consent.[8]

Oregon and Washington conferred on the Gorge Commission considerable regional land use planning authority, including the powers: 1) to adopt a management plan specifying the range of and setting forth the standards by which counties determine the permissible land uses within the Scenic Area; 2) to disapprove county land use ordinances if they are inconsistent with the

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[8] The Ninth Circuit stated that "[a]ll parties to this appeal agree that the compact between Washington and Oregon * * * is one which requires such congressional consent[.]" (Pet. App. A-9). That statement is not accurate; the Gorge Commission did not concede such consent was required. In its brief, the Gorge Commission urged that, inasmuch as Congress clearly did consent and that consent was valid, the court did not need to determine whether Congress's consent was required under the Compact Clause. The Gorge Commission then noted that petitioner had not, in any event, cited the complete test for determining whether Congress's consent was required. The commission further argued that petitioner had not explained, under the correct test, how any provision of the compact or the authority the two states gave to the Gorge Commission would "encroach on the just supremacy of the United States." *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). Thus, even if this Court were to decide that the entire Scenic Act, including Congress's consent, was invalid, petitioner would still be required to demonstrate that the bi-state agreement to form the Gorge Commission was a compact within the meaning of the Compact Clause, thus requiring Congress's consent.

management plan; 3) to enact land use ordinances for a county that declines to enact ordinances consistent with the management plan; and 4) to review and approve or disapprove all proposals for major development action and new residential development within the Scenic Area outside urban areas. To the extent, then, that petitioner's grievance in this case is about the diminution of *local* land use planning authority in the Gorge, that diminution of authority has occurred and will continue regardless of the correctness of the Ninth Circuit's analysis in this case.

For petitioner ultimately to prevail in this matter, petitioner would have to convince this Court not only that petitioner's Commerce Clause, Tenth Amendment and Compact Clause arguments all had merit, it would also have to convince the Ninth Circuit on remand that Congress also lacked authority under the Property Clause to enact land use regulations within special management areas in which the federal government is the dominant land owner. In addition, this Court would have to take the extreme position of declaring null and void Congress's consent to the bi-state agreement, and the Ninth Circuit on remand would have to determine that Congress's consent indeed was required.

Petitioner has failed to demonstrate that it has even a remote chance of overcoming all of these obstacles. Yet, for this case to be of importance regionally or even locally for petitioner and its members — for petitioner to rid the Gorge of a regional planning entity — petitioner must overcome each of them. Whether the Ninth Circuit used the correct analysis in deciding this case simply has little to do with the success or failure of regional land use planning in the Gorge and does not merit this Court's review.

II. Petitioner's Compact Clause and Tenth Amendment arguments lack merit.

A. Oregon and Washington voluntarily sought and accepted Congress's help in developing and implementing a regional planning strategy for the Columbia River Gorge.

Petitioner argues that the Scenic Act is a product of federal power-grabbing, typified by petitioner's characterization of Congress having "arrogated unto itself the power of imposing land use planning on the people of the Gorge." Pet. 8. Petitioner further argues that the states were "coerced" into entering into the Compact due to the threats of withholding federal grant moneys and federal permits needed to pursue "virtually any economic activity" in the Gorge. Pet. 22.[9] The Ninth Circuit rejected these same arguments, observing that the district court had found the absence of coercion and its findings were not clearly erroneous. Pet. App. A-4. Petitioner does not argue that the Ninth Circuit erred in so holding, but merely reasserts the argument in this Court as though the court of appeals had never addressed it.

Petitioner's argument that the federal government coerced the states in any manner lacks merit. The federal government's involvement was solicited by public officials elected to serve at

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[9] Aside from mentioning that federal permits are needed for grazing on federal land and for activities within a wetland, petitioner offers no support for its assertion that the threat of withholding federal permits would stop all economic activity. Not only is petitioner's bald assertion unsupported factually as to general management areas or even special management areas, it is incorrect legally as to urban areas. The authority to withhold federal permits under § 544l(e)(1) expressly excludes activities within urban areas. Nevertheless, petitioner's assertion of extensive, existing federal permit activity in the Gorge certainly is flatly inconsistent with its assertion that Federal interests in the Gorge are insufficient to justify its involvement in land use planning for the Gorge.

both the state and national level. The Scenic Act, quite simply, is the product of voluntary, cooperative federal-state action, the impetus, insistence and ultimate design for which came from the affected states and their elected representatives.

B. Petitioner can make no credible Tenth Amendment claim that the political process failed or that the federal government commandeered the states to achieve federal interests in the Gorge.

Respondent Gorge Commission agrees with the federal government's argument in response to petitioner's Tenth Amendment claim. First, the national political process did not fail; it worked and worked well. Petitioner and its members simply did not get out of the process what they hoped for. Oregon and Washington received from Congress exactly what they requested: federal assistance in preserving the Columbia River Gorge. The division of responsibility and accountability set out in the Scenic Act was the product of a political process in which citizens and local, state and federal elected officials participated extensively. Of course, not everyone agreed fully with the result at the conclusion of the process. But the hearings, workshops and debates surrounding enactment of the legislation plainly evidence its support from 1) Senators and Congressmen; 2) other elected officials from both states, including the governors and legislatures of both states; 3) representatives of various interest groups; and 4) citizens. That petitioner and its members were not among those supporting the Act is hardly an indication that the political process failed.

Second, no legitimate claim can be made that the federal government commandeered the states to achieve federal interests in the Gorge. The "requirements" that Congress levied on the states were not mandatory; the states could opt out of complying

simply by abandoning the regional planning concept.[10] Certainly, Congress offered strong incentives to the states to create the bi-state regulatory commission and to counties to adopt zoning ordinances that comply with the commission's management plan within the highly sensitive special management areas. But as this Court recently held in *New York v. United States*, 112 S. Ct. 2408 (1992), that Congress may make it difficult for states to refuse to regulate in a manner Congress has determined would promote the general welfare is not reason enough to strike down federal legislation. As this Court observed, it has repeatedly upheld federal methods for influencing state policy choices so long as they fall "short of outright coercion." *Id.* at 2423.

Unlike *New York v. United States*, however, to determine the validity or enforceability of the requirements Congress imposed on the states does not require an analysis of whether Congress unduly exacted state compliance. Congress unquestionably had the authority to empower the Secretary of Agriculture to adopt interim guidelines for the entire Scenic Area; the only issue is whether Congress could force the states, acting through the Gorge Commission, to comply with those guidelines. Unquestionably also, Congress could adopt land use designations and guidelines for special management areas and make these binding with respect to federal land; the only issue is whether Congress

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[10] These "requirements" took the form of conditions to Congress's consent to the formation of the compact and the creation of the Gorge Commission. Chief among those conditions were the states' agreement: 1) to abide by interim guidelines for the entire scenic area as developed by the Secretary of Agriculture until the management plan was approved; 2) to apply general standards articulated in the Act for protecting and enhancing agricultural and forest lands, open spaces and recreation resources in development of the management plan; and 3) to incorporate into the management plan land use guidelines for special management areas as developed by the Secretary.

could force the states, acting through the Gorge Commission, to comply with those guidelines on non-federal lands.

However, it is unnecessary in this case to determine whether Congress could, unilaterally and under its enumerated powers, force the states to comply with interim guidelines for the entire scenic area, to adopt into the management plan the Secretary's land use guidelines for both federal and non-federal lands within special management areas and to apply federal standards in adopting the management plan. Those issues are beside the point for the very simple reason that the states voluntarily agreed to abide by these terms when they entered into the compact.

In *New York v. United States*, this Court addressed whether New York, a non-compact state, was obligated to comply with the "take title" provision of the Low-Level Radioactive Waste Act, 42 U.S.C. § 2021b *et seq*. Because New York and five other states had not agreed in a regional compact to be bound by the "take title" provision, the Court had to address whether these states were bound to follow this portion of the Act. But as Justice Stevens, dissenting, correctly noted, notwithstanding the correctness of the majority's holding as to the validity of Congress's requirement as applied to New York, the "take title" provision

> * * * remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect.

112 S. Ct. at 2447, n.3.

As with the 44 compacting states who voluntarily agreed in regional compacts to be bound by the "take title" provision of the Low-Level Radioactive Waste Act, Oregon and Washington here agreed in their compact to be bound by the requirements of the Scenic Act. Whether Congress, under its Commerce Clause or other enumerated powers, or even under its power in the

Compact Clause to attach conditions to its consent to interstate agreements, could require Oregon and Washington to abide by the requirements of the Act is, perhaps, an interesting question in the abstract. Because, however, Oregon and Washington formally have agreed to comply with these requirements, the issue is largely irrelevant in this case.

III. Petitioner's claims of federal overreaching are without merit and largely moot.

Petitioner's most significant claims of federal overreaching involve: 1) the Secretary of Agriculture's authority to adopt land use guidelines and designations that are binding on both federal and non-federal land located within special management areas; 2) the Secretary's authority to adopt interim guidelines for the entire scenic area that the states, through the Gorge Commission, must apply prior to adoption of the management plan; and 3) the inclusion in the Act of general standards that the Gorge Commission must apply in developing the management plan for the Scenic Area.

For the reasons set forth by the federal government in its brief in opposition at pages 6–7, respondent submits that petitioner's challenge to the Secretary's authority within special management areas is without merit.

Moreover, petitioner's remaining arguments are or soon will be largely moot. Petitioner states in its petition that the management plan for the Scenic Area has now been adopted and has replaced the interim guidelines. Pet. 7.[11] Thus, whether Con-

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[11] Petitioner's statement that the management plan has replaced the interim guidelines is premature. The interim guidelines remain in effect until after counties adopt land use ordinances that implement the plan. § 544h(a). Because, however, county ordinances must be adopted within 270 days of receipt by the counties of the management plan (§ 544e(b)(2)), and because

(continued...)

gress could empower the Secretary of Agriculture to adopt those guidelines and make them binding on the states is largely an academic question of no meaningful significance to this case. Similarly, whether Congress could require the states, acting through the Gorge Commission, to consider general planning standards in adopting the management plan is now largely moot since the plan has been adopted. Even if, however, these questions are not technically moot, their importance has withered far beyond the point of meriting review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,
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[11](...continued)

counties received the plan in April of this year, as a practical matter the guidelines have very limited useful life remaining. The guidelines should be replaced by land use ordinances by the first of the year at the latest.

Supreme Court, U.S.
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No. 92-52

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

COLUMBIA GORGE UNITED--
PROTECTING PEOPLE AND PROPERTY,
Petitioner,

v.

EDWARD R. MADIGAN, JR., Secretary of Agriculture
of the United States; and the
COLUMBIA RIVER GORGE COMMISSION,
Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE,
Intervenor-Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY OF PETITIONER, COLUMBIA GORGE UNITED--PROTECTING PEOPLE AND PROPERTY

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REPLY OF PETITIONER, COLUMBIA GORGE UNITED--PROTECTING PEOPLE AND PROPERTY

INTRODUCTION

New truths, principles, and guiding philosophies are discovered or popularized in every era. Some of these principles and truths, such as women's suffrage or civil rights, have withstood the test of time. Others, such as manifest destiny or the inevitability of the fall of capitalism, have not. It is not and never has been the role of this Court

to pick and choose winners and losers in the contest of emerging political paradigms. Instead, it has been the duty of this Court to judge whatever stratagems Congress throws out to achieve its current philosophical and political objectives against the principles of the Constitution. That is not to say that our understanding of the Constitution has not evolved and changed; to varying degrees it has. And this is not to say that the meaning of the Constitution is always clear in regard to modern demands; it is not. But those caveats do not lessen the importance of this Court's role to judge all new schemes of governance that implicate a change in the constitutional way of doing things, even (if not especially) when the goals sought to be achieved are part of a new emerging "universal" truth.

So it is with the importance of protecting the environment. The protection of the environment is a new paradigm that appears (fortunately) to be here to stay. But that does not mean this Court should avoid focusing on questionable schemes to meet the newly popular objectives of environmentalism. That does not mean that the state governments must abandon their sovereignty to the federal.

Yet when the respondent Columbia River Gorge Commission (Commission) begins its brief in opposition with a lengthy description of the flora and fauna of the Gorge it is doing so with a particular purpose in mind. The Commission hopes to convince this Court that the environment of the Gorge is so important that this Court's attention to the details of the constitutionality of the congressional scheme at issue may be less focused than usual. The Commission is surrounding a highly questionable congressional scheme with a gauze of reverence to natural beauty in the hope that this Court will not see the infirmities of the statute.

Both the Commission and the federal respondent have avoided facing up to the fact that the Columbia River Gorge National Scenic Area Act is unique in American legislative schemes. They have avoided acknowledging that this Act treads on and beyond the outward limits of constitutionality.

They are hoping this Court will choose not to consider the implications of this Act. For the reasons stated below, this Court should not be diverted by the arguments of respondents.

I
IT IS THE FEDERALIZATION OF LOCAL LAND USE PLANNING THAT MAKES THE STATUTE UNCONSTITUTIONAL

In order to convince this Court that this case is not worthy of certiorari, the Commission tries to minimize the importance of the Gorge Act and misstates the core of petitioner's objections to that Act. In a nutshell, the Commission argues that Columbia Gorge United's (CGU) case is designed to destroy all regional land use planning. For example, the Commission argues in its brief at 15 that "petitioner['s case is] to rid the Gorge of a regional planning entity." Similarly, the Commission claims that CGU wishes "to turn back the clock to the time when land use planning in the Gorge was a purely local affair." Respondent's Brief in Opposition (Commission Brief) at 11.

There is no basis for this straw man characterization of CGU's argument. In this petition CGU is not objecting to land use planning in the Gorge whether it be by the state or local government. CGU strenuously objects, however, to the *federalization* of local zoning decisions and the utilization of a "compact" to create a commission that falls outside the parameters of the Constitution.

The Commission argues that regional land use planning was inevitable and would have occurred with or without the federal legislation. Commission Brief at 15. This case, however, is not about a hypothetical compact where two states merely decide to get together to cooperate on land use planning on nonfederal lands. It is about existing legislation that deeply insinuates the federal government into local land use planning in a manner beyond that allowed by the Constitution. Thus, when the Commission claims that the

states of Washington and Oregon could have entered into a compact dealing with regional land use planning, *id.*, that assertion is irrelevant to what actually is being challenged in this case.[1]

CGU argued below and presents the argument in its petition for certiorari that the *federalization* of land use planning in the Gorge renders the entire act invalid. *See, e.g.*, CGU's reply brief before the Ninth Circuit at 21; CGU's petition for certiorari, *passim*. To be specific, because all sections of the Gorge Act purport to be conditions for a compact, all sections violate the Compacts Clause and cannot be deemed as consent to a compact. Concomitantly, none of the state statutes which purport to authorize the states to enter into a compact actually serve to create a valid compact and are without force and effect. *See New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 154 (1992) (unconstitutional acts cannot be "ratified by the 'consent' of state officials").

The federal government asserts power over a variety of activities in the Gorge. It bases this power on certain enumerated powers described in the Constitution. It is a violation of the Constitution for the federal government to act

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[1] The Ninth Circuit's finding that the alleged compact in this case requires federal approval has not been made an issue in CGU's petition or questions presented. In any event, because the Commission has the power to enact a regional plan and strict land use controls over National Forest land, and because federal agencies must act in a way that is "consistent" with the act, 16 U.S.C. § 544l(d), congressional consent is required. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978). CGU's assertion that the federal act is invalid necessarily implies that the compact itself is invalid.

If the states were to design a new compact that does not require the federal government to exercise authority not found in the Constitution and that did not impinge on federal sovereignty, then such a compact and accompanying state statutes might survive scrutiny. That, of course, is not the tenor of the present case.

outside of its specific enumerated powers. *See* U.S. Const. Amend. X. Because these enumerated powers do not in fact provide the authority assumed, various sections of the Gorge Act cannot be justified.[2]

Nor is CGU arguing that two states cannot cooperatively solicit and utilize "the assistance of the federal government." *See* Commission's Brief at 12. That is not what has happened here. Rather the federal government has mandated its "assistance" on the state governments which have had no practical choice but to accept that assistance.

Thus it is not the existence of *state* involvement in land use planning that CGU argues is unconstitutional, but the insinuation of the federal government into that process.[3]

II

THE COMPACT IS INVALID

The creation of the unique "compact" in this case, which is unprecedented in the scope of federal participation in the creation of all the details of the compact and in the coercive nature of the states' "agreement" to the compact, merits this Court's attention. If the Compacts Clause is not to become

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[2] For example, there is no Commerce, Property, or Spending Clause justification for those sections that purport to grant the Secretary various levels of authority over nonfederal lands, including Sections 544a, 544b, 544c, 544d, 544e, 544f (except 544f(a) and (b)), those subsections of 544g referring to acquisition "needed to achieve the purposes of Sections 544 to 544p," 544h, 544m, 544n, and 544o(d) and (e). Additionally, there is no Property Clause justification for Sections 544i, 544j, 544k, and 544l and no Spending Clause authority for Section 544k.

[3] The Commission suggests at the end of its brief that the case may be moot because a final plan has superseded the interim plan which was created by the Secretary. This is nonsensical because the federalization of the Gorge continues with the final plan: portions of the plan were created by the federal government, it was subject to federal approval, future local land use ordinances remain subject to federal approval, and subsequent changes will be subject to federal approval. *See, e.g.*, 16 U.S.C. §§ 544d, 544f. The case is not moot.

the carte blanche of the next century for federal involvement in areas beyond its enumerated powers, this Court should carefully determine whether the parameters of the Compacts Clause have been exceeded in this case.

The Commission argues that the states were not coerced into accepting the compact because it was the product of "voluntary, cooperative federal-state action." Commission Brief at 17. It was not. The Ninth Circuit made the bald assertion that the District Court was not "clearly erroneous" when it found the compact was voluntary. Opinion at A-4 in petitioner's appendix. The Ninth Circuit, however, completely failed to address CGU's arguments that the extensive power of federal permitting in the region would have made the state's failure to adopt the compact a sort of self-inflicted economic capital punishment. That is because communities with wetlands, federal timber land, federal grazing land, and so on within the General and Special Management Areas must have federal permits to survive. The statute authorizes the federal government to stop issuing permits. The exercise of this power, used to achieve the goals of the Act, could have brought economic activity to a standstill. While the federal government may have legitimate power to require permits for activities such as wetland development, it cannot use this legitimate power for an extraneous *illegitimate* end: the coercion of states to adopt a compact that gives the federal government powers beyond those enumerated in the Constitution. *See* David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY 93, 98 (1985). Thus, not only did the Ninth Circuit fail to consider the matter of coercion as a factual matter, it also failed to recognize the legal infirmity

of the United States' use of its legitimate permitting authority to force the adoption of a compact.[4]

The federal respondent, the Secretary of Agriculture, argues that Congress validly gave its consent to a compact entered into by Oregon and Washington and that there are *no* procedural limitations upon the manner by which Congress may grant its consent.[5] Brief of the Federal Respondent in Opposition (Federal Respondent's Brief) at 8. The Secretary is ignoring the realities of this case. The entire "compact," down to its most minute detail, including "conditions" that give the federal government unprecedented powers beyond those enumerated in the Constitution, was completely the product of *federal* legislation.[6]

In the context of other constitutional provisions, this Court has made it clear that activities that are supposed to originate with other branches of government cannot be taken over by Congress--even if the other branch continues to play a role in the activity. Thus, as explained on Page 28 of CGU's petition, this Court has held that the Appointments Clause and the Treaty Clause prevent Congress from making

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[4] This is different from the situation where the federal government utilizes its spending power to convince states to adopt federally inspired regulations because states can always take the money or leave it. They cannot, however, watch economic activity grind to a halt because otherwise legitimate but federally regulated activities are halted pending adoption of a compact.

[5] The Commission writes that CGU is arguing that Congress cannot give its advance consent to the formation of a compact. *See* Commission Brief at 11 n.7. That is, of course, wrong. CGU recognizes that Congress may give advance consent to a compact. *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981). Here, however, CGU argues that the manner in which Congress gave its consent, and the invalid conditions attached to that consent, make the compact a nullity.

[6] *See* Petition for Writ of Certiorari at 3 n.2 for descriptions of the legislative process used to create the compact.

appointments or negotiating treaties. Just as Congress cannot draft a treaty in its entirety in advance and suggest that the executive branch then sign it, there must be inherent procedural limitations on the exercise of Congress' power to "approve" compacts that are supposed to be the product of the state sovereigns. This Court should use the opportunity presented by CGU's petition to explore whether or not the same sort of prudential limitations placed on Congress' authority to approve treaties and appointments should apply to the approval of compacts as well.

III

THIS COURT SHOULD CONSIDER WHETHER THE NINTH CIRCUIT HAS STRETCHED CONGRESS' COMMERCE CLAUSE AUTHORITY BEYOND ITS CONSTITUTIONAL LIMITATIONS

The Secretary has ignored the basis of CGU's objection that Congress lacks power under the Commerce Clause to regulate local land use planning. The Secretary, instead, argues only that there is a "rational basis" to find that the regulation will affect interstate commerce. The purpose of this statute was not to regulate commerce but was to enhance scenery and recreation. *See* CGU's petition at 10-11. However, under the rational basis to affect commerce test, any and every activity in the universe could be regulated because it would affect commerce. Because this regulation is not a means to effectuate the legitimate end of regulating commerce, it cannot be sustained. *See* Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMMENTARY at 98. With this case this Court can explain whether or not the Commerce Clause relates to regulations that actually are designed to affect commerce or whether all that is required is a talismanic connection to commerce. This Court can also decide the validity of the Ninth Circuit's new Commerce Clause test--that *virtually anything* can be regulated by Congress in an area Congress deems to be of "critical

national significance." Ninth Circuit Opinion, reproduced in petitioner's appendix, at A-7.

IV
NEW YORK v. UNITED STATES APPLIES TO THIS CASE

The federal government attempts to differentiate this case from *New York v. United States*, by claiming that the "statute does not obligate the States to do anything much less enact a regulatory scheme." Federal Respondent's Brief at 7. Similarly, the Commission argues that *New York* does not apply because the states "voluntarily agreed" to the compact. Commission Brief at 19. Respondents are ignoring reality. Congress created the compact and forced the state to "adopt" it and abide by its terms at risk of suffering severe penalties in the form of permit denials and federal condemnation of state and private land. 16 U.S.C. §§ 544g, 544l, 544n.

Pursuant to the statute at issue in *New York*, some states had voluntarily entered into compacts for the disposal of nuclear wastes including the "take title" provisions. These particular compacts were not struck down in *New York*. As this Court correctly noted, there is nothing wrong with a state's voluntary agreement to regulate an area that *could* be regulated by the federal government. 120 L. Ed. 2d at 144-45. The other states did not argue that their compacts were invalid in *New York*. More importantly, under the terms of the radioactive waste disposal statute in *New York*, the federal government was *not* using the threat of permit denials and the like to force the states to enter into compacts which would have significantly increased federal jurisdiction over activities that were never before regulated by the federal government and for which no enumerated power to regulate exists. Rather, the problem in *New York* involved the choices left to states that were unable or unwilling to enter regional compacts. Those states had the choice of accepting the "take title" provisions or regulating waste according to the instructions of Congress. 120 L. Ed. 2d at 150. This

Court found the choice to be unacceptable because "the take title incentive does not represent the conditional exercise of any congressional power *enumerated in the Constitution.*" 120 L. Ed. 2d at 150 (emphasis added).

The same choice is presented in this case. A state must either consent to giving the federal government powers beyond those enumerated in the Constitution or find itself subject to a coercive federal regulatory regime (with permit denials) which is designed to achieve goals outside the enumerated powers.

CONCLUSION

Congress may use whatever means it has available which are necessary and proper to effectuate an *enumerated* end. This case presents the unique circumstance of the federal government using a combination of threats and the Compact Clause to extend its jurisdiction *beyond* the authority of its enumerated powers.

This Court needs to take a long and careful look at what Congress has wrought with the Columbia Gorge Act. Certiorari should be granted.

DATED: September, 1992.

Respectfully submitted,

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In The

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October Term, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD G. MADIGAN, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Respondents.

and

FRIENDS OF COLUMBIA RIVER GORGE,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF OF *AMICI CURIAE* OF THE AMERICAN SHEEP INDUSTRY ASSOCIATION, THE MAINE CONSERVATION RIGHTS INSTITUTE, MOUNTAIN STATES LEGAL FOUNDATION, AND THE NATIONAL INHOLDERS ASSOCIATION IN SUPPORT OF PETITIONER

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Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of the

Columbia Gorge United – Protecting People and Property, Petitioner for *Certiorari*.[1]

INTERESTS OF *AMICI CURIAE*

The American Sheep Industry Association (ASI) is a federation of 49 member states and is the national voice of the 110,000 sheep producers in the United States. The ASI was created in 1989 through the merger of the National Wool Growers Association and the American Sheep Producers Council. The history of these predecessor organizations extends back over 120 years and represents the oldest livestock commodity group in the United States. The purpose of the ASI is to promote the general welfare of the sheep industry.

The ASI is greatly concerned with these issues because members of its Oregon and Washington state associations are directly impacted by the Columbia River Gorge National Scenic Area Act and the ASI is greatly concerned about the implications for protection of private property rights nationwide.

The Maine Conservation Rights Institute (MECRI) is a non-profit, public interest research and education institution founded in 1990. MECRI has 400 contributing members who are greatly concerned that 26 million acres

[1] *Amici* has obtained the written consent of the parties. Their written consent has been provided to the Clerk of the Court under separate cover.

of mostly private land in Maine, New Hampshire, Vermont, and New York could soon become subject to federal land-use controls as a result of this case. MECRI encourages options for private conservation and wise use of the land, and is also an active private land trust.

Mountain States Legal Foundation (MSLF) is a nonprofit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundation's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues.

The National Inholders Association (NIA) is a public interest and private property advocacy organization that protects the rights of people who own property, permits, leases, mining claims or other equity interest within federal and state managed lands or who are impacted by the management, regulation of, or access to, those areas. The NIA has 16,000 members throughout the 50 states.

STATEMENT OF THE CASE

Amici adopts the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

In passing the Gorge Act, Congress usurped state democratic institutions and exceeded the commerce power. This overreaching by the national government is only one instance of a continuing trend toward centralized decision-making that threatens to destroy the federal structure of government in America.

REASONS FOR GRANTING THE WRIT

A. FOR CONSTITUTIONAL AND POLICY REASONS INDEPENDENT STATE DECISION-MAKING MUST BE PRESERVED

This Court's decision in the instant case will greatly influence the future of American government. The ruling will foretell either the gradual abandonment of federalism or a return to the separation of powers envisioned by the Constitution.

The nature of national-state relations has changed rapidly in the last few decades. The scheme known as "co-operative federalism" increasingly appears to be a device of national decision-making that endangers the federal structure of American government. States are rapidly becoming departments of the national government whose elected legislatures and executives must take orders from Congress and federal administrators. Today, one-quarter to one-third of an average state's budget is made up of federal funds. National Conference of State Legislators, State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities 9 (1979).

If federalism is to remain viable, the judiciary must again act to delineate the boundaries of national and state powers. From this Nation's beginnings, until the New Deal era, the courts consistently recognized the importance of state sovereignty. *See, e.g., Coyle v. Smith*, 221 U.S. 559 (1911); *United States v. Butler*, 297 U.S. 1 (1936). "Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers". *New York v. United States*, 60 U.S.L.W. 4603, 4608 (1992).

Although *New York* was a further step in establishing guidelines for preserving state autonomy, marking the reawakening of state sovereignty principles, it did not provide a clear test for determining when the federal government has overstepped the bounds of its enumerated powers. Such a clear test is absolutely necessary to insure a continuation of autonomous state decision-making.

1. National Decisions Disguised As State Decisions Obscure The Lines Of Political Accountability

The reality of "co-operative federalism" is that it creates numerous programs which are neither fully state programs nor fully national programs. Certain aspects of a program might have primarily state functions while some may have primarily national functions, but the bulk of co-operative programs are a confusing mix of authority and functions. The Columbia River Gorge National Scenic Area Act (Gorge Act), 16 U.S.C. §§ 544-544p, directly compels state and local legislation to be enacted in accordance with the requirements of the Gorge Act. 16

U.S.C. § 544f(f). Refusal to follow the demands of the Act or the Secretary of Agriculture's regulations results in a usurpation of the state's role by a federal program. 16 U.S.C. § 544f(k), (l), and (m).

This regulatory structure entirely distorts the lines of political accountability. Dissatisfied citizens in the Columbia River Gorge have no clear recourse. State governments cannot alter programs because they are subject to continuing national commands, and federal agencies cannot unilaterally alter the state programs. Change is consequently more difficult because neither governmental entity alone is able to amend or abolish an unsatisfactory program. Thus, a representative form of government, reliant upon citizen input, erodes into an unresponsive and confusing labyrinth that is far removed from the fundamental principles of our constitutional system. *See, Stromberg v. California*, 283 U.S. 359, 369 (1951); *United Mine Workers District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967).

2. State And Local Level Decision-making Allows More Citizen Input And More Consideration Of Local Factors

States long functioned as the governmental units most directly affecting the lives of individuals. As American life has become more complex and as population has increased, individual control over, and input into, the governing process has naturally decreased. However, this inevitable lessening of an individual's potential impact has been unduly accentuated by the increasing amount of federal regulation and by the centralization of decision-

making. Thus, it is not surprising that public participation in the electoral process has gradually declined as individual efforts to influence the government have become more futile.

Furthermore, the removal of decision-making from the hands of state-level legislators and administrators to those on the national level necessarily decreases the attention to local circumstances and local problems. An administrator who must plan for the entire country cannot easily tailor a plan to community needs.

3. State/National Separation Of Powers Is A Valuable Safeguard Against Dangerous Accumulations Of Power

The Constitution is an instrument carefully designed to protect individual freedom by pitting the branches of government against each other. *See, Buckley v. Valeo,* 424 U.S. 1, 120-123 (1976). The separation of powers between the national and state governments is as essential to the American structure of government as the separation between the three branches of the national government. *Gregory v. Ashcroft,* 501 U.S. ___, 111 S.Ct. 2395, 2400 (1991). The purpose behind both types of separation was the same: to protect against the tyranny that could arise from the accumulation of all powers in the same hands. The two-fold protection envisioned by the authors of the Constitution was explained by James Madison in The Federalist No. 51.

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments. Then the portion allotted to each is subdivided among distinct and separate departments.

"States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 60 U.S.L.W. 4615 (1992). Hence a double security arises to ensure the rights of the people. The different governments can control each other, while at the same time each will control itself.

The reluctance with which power was given to the national government is illustrated by the Court's observation in *South Carolina v. United States*, 199 U.S. 437, 456 (1905):

> The opposition to the Constitution came not from an apprehension of danger from the extent of power reserved to the states, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government.

The fact that Americans have become accustomed to a massive, centralized government does not diminish the wisdom of the early patriots' concern. During this Court's current opportunity to reevaluate federal principles, the words of Justice Frankfurter, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952), may prove to be a valuable reminder:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

4. States Serve An Important Role As Laboratories For Social And Environmental Experimentation

A crucial reason for preserving independent state decision-making is to encourage states to explore new

approaches to governmental problems. As noted by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion):

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Independent innovation is particularly necessary in the case of new government regulatory activities, such as environmental regulation, because state experimentation can hasten the development of successful regulatory techniques. Furthermore, because long-term impacts of environmental regulation may not be readily apparent, experimentation on a local level may avert major adverse effects at a broad level. The Gorge Act and its accompanying regulations contain numerous requirements that are highly technical and very detailed. Little latitude is provided for state flexibility, and state experimentation is discouraged. "While Congress has substantial powers to govern the Nation directly, including areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 60 U.S.L.W. at 4608. In evaluating the constitutionality of the Gorge Act, the Court should consider the desirable public policy of allowing state innovation.

B. THE COLUMBIA GORGE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE TENTH AMENDMENT

Few dispute the proposition that "the Constitution created a Federal Government of limited powers,"

Gregory v. Ashcroft, 501 U.S. ___, 111 S.Ct. 2395, 2399 (1991). Yet, while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" the task of ascertaining the constitutional line defining the scope of state autonomy has proven to be a difficult one. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States, if a power is an *attribute of state sovereignty* reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 60 U.S.L.W. at 4606 (emphasis added). "The States do retain a *significant* measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548 (1985) (emphasis added).

Even though an act of Congress may be within the scope of the Commerce Clause, Congress may not exercise this authority in a manner which impairs attributes of sovereignty attaching to every state government, particularly inherent governmental functions essential to the very separate and independent existence of the states to meaningfully serve as forums for democratic self-governance.

New York is but a part of the evolution of the "limits imposed by federalism," which evolution must take place "just as our understanding of Congress' power under the

Commerce Clause has evolved."[2] Anything short of such balanced evolution will eventually leave but a national constitution, as opposed to the "compoundly federal and national Constitution" as intended by the Framers.[3]

If the Commerce Clause has evolved to the extent of reaching local activities which affect commerce "even in the minutest degree,"[4] then Congress quite obviously can extend its powers into areas "never intended" or contemplated by the Framers of the Constitution[5] which is entirely contrary to implicit federalism concepts. The necessity for the concomitant evolution of the limits imposed by federalism on the Commerce Clause power as it affects the attributes of sovereignty of the states, is self-evident.

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[2] *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). It may be that "experience" and not "logic" or even political philosophy is at the base of the evolution of Federalism principles. *California v. United States*, 438 U.S. 645, 646 (1978). The *New York* contribution to federalism's limits come in the summarical language of Justice O'Connor; "it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." 60 U.S.L.W. 4607 (1992).

[3] Diamond, *Commentaries on the Federalist*, 86 Yale L.J. 1273, 1282-83 (1977).

[4] *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled, *Garcia v. San Antonio*, 469 U.S. 528 (1985).

[5] *See, Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

When writing the majority opinion in *Garcia*, Justice Blackmun rejected the tests employed by previous courts for discerning what constitutes the essential elements of state sovereignty. The error with each of these tests, Justice Blackmun noted, is that they inevitably invite an unelected federal judiciary to make decisions about which state policies it favors or dislikes. Rather than looking at governmental functions, the Court focused on *"principles of democratic self governance."* *Garcia* at 546 (emphasis added).

Federalism principles, implicit in the Constitution, demand an initial inquiry into democratic principles of self-governance *necessarily* performed by state and local governments. Land use planning and control is an essential attribute necessary to the separate and independent democratic state governments because: (1) it encompasses the process of evaluating, establishing and zoning wholly intrastate non-commercial state and private activity, as well as commercial activity, in order to effectuate the desired nature of and the quality of life in local communities (which is not the private business activity differentiated in *New York*); (2) it cannot be viewed in a single dimension as an exercise of the police power, rather, land-use planning is a hybrid governmental service by which states and local communities define and effectuate the nature and quality of their existence as well as governmental fiscal structure; (3) federalism principles involve concepts of local self determination and accountability essential to the determination of and quality of the existence for local communities and their people; (4) land-use planning and control is, in fact, the manifestation of a physical quality of a state because it is a state's

use of its lands, *i.e.*, an assertion of a state's quasi-real property interest in the land within its borders; and (5) the presumed local benefit-burden resulting from land use planning and control or the "average reciprocity of advantage" becomes nonexistent if exercised by the Federal Government under the Commerce Clause and would raise serious Fifth Amendment questions.

The Gorge Act, as erroneously justified by the Ninth Circuit Court of Appeals, attempts to view and define federal land use planning and control solely in terms of "national significance." However, land-use planning and control necessarily involves evaluating, establishing and zoning intrastate non-commercial state and private activity,[6] as well as commercial activity, in order to effectuate policies (which transcend economics) for the overall nature of and quality of life in local communities.

The essence ("experience") of land use planning and control transcends being characterized solely in terms of a power source. States and their local communities,

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[6] No Commerce Clause case has involved even remotely similar far-reaching impacts on intrastate private and state non-commercial activity as presented by direct federal land-use planning and control using a "national significance" standard. Many cite *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing the Commerce Clause power to reach the personal consumption of wheat. Such a view is a gross distortion. A person growing wheat in their backyard only for personal consumption, no part of which is to be sold in commerce, was not subject to the Agricultural Adjustment Act. However, federal land-use planning under the "national significance" standard would prohibit wholly intrastate private and state non-commercial activity, even though a state or local community would benefit from other uses, *i.e.*, the quality of life in and the nature of local communities.

through the means of land use planning and control, define and effectuate that intangible but recognizable quality of life within a given community, including whether it will provide "open space" and limit population density, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); whether it will encourage industrial development, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and whether it will seek to preserve historic and natural advantages, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). These decisions are based upon such considerations as the location and availability of fire, water, and sewer services to a given area; potential depletion of local resources; availability of other suitable lands; meeting a community's growth demands; protecting the public health by appropriately zoning incompatible uses; providing recreational opportunities for its citizens, and providing a sufficient tax base to support local governmental services. "Accountability is thus diminished when due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . . " *New York*, 60 U.S.L.W. at 4610.

Land-use planning and control is also integral to the local governmental financial structure and stability necessary to the delivery of certain essential governmental services. In fact, most of the school systems throughout the United States are financed directly by and their quality is dependent upon real and personal property tax revenues, *see, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 10 (1973). Local communities utilize land-use planning concepts interrelated with property taxes to encourage or discourage various uses of property and to enhance the financial stability of the

governmental unit so as to be able to make and effectuate policy decisions in these governmental service areas.

Amici believe that the case at bar is of broad national legal significance for two very important reasons. First, the Columbia Gorge National Scenic Area is being promoted as one of a handful of "models" by single-interest groups, members of Congress and federal officials to be copied around the nation in an attempt to gain control over vast areas of private property. For example, the "Northern Forest Lands Study," produced by the United States Forest Service, recommends a Columbia Gorge Act-like umbrella strategy for preservation and control of 26 million acres of mostly private land in Maine, New Hampshire, Vermont, and New York. The study found these lands to be "nationally significant" for economics and recreation. S.C. Harper, L.A. Falk, and E.W. Rankin, *The Northern Forest Lands Study of New England and New York* at 1 (1990). The report was authorized by Congress in Pub. L. No. 100-446, 1988 U.S. Code Cong. & Admin. News at 102 Stat. 1774, and in reliance on a conference committee report, 134 Cong. Rec. at H6808 (Aug. 10. 1998). Thus, under the Ninth Circuit's interpretation of the Commerce Clause, this would render the entire 26 million acres susceptible to federal land use planning and control.

Second, the concept of designating areas as "nationally significant" as a justification for federal land-use controls is rampant throughout the federal land management agencies. A "national significance" standard is nothing more than a device designed to skirt the Constitution's provisions for a limited federal government and protection of individual liberties, all protections of little

value if Congress is free to convert clearly defined private rights into vast public rights. Liberty is nothing if it is to be subjected to such utilitarian calculations, or to the dictatorship of unconstrained majoritarianism. Under the Ninth Circuit's interpretation of the Commerce Clause, Congress would be free to set up "internal colonies" in which people will be disenfranchised from their state and local representative governments and stripped of their constitutional and civil rights.

This essence and "experience" of land use planning and control embodies elements of Federalism and local self determination and accountability. As recognized by this Court: "[z]oning laws and their provisions, long considered essential to effective urban planning are peculiarly within the province of the state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[7] and are essential because of the very diverse culture, geography, geology and climate among the States which "have all but necessitated the recognition of legal

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[7] For more than 200 years, regulation of land use has been exercised exclusively by the states. *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The Gorge Act in effect thus raises a critical question as to whether Congress can effectively amend the Constitution, and accomplish a transfer of these historically held state powers to a federal agency in Washington, D.C., simply by making a legislative finding that an area encompassing mostly private land is "nationally significant."

distinctions corresponding to these differences," including principles of federalism. *California v. United States*, 438 U.S. 645, 648 (1978).

In fact, "[p]reservation of local control, naturally enough, involves protecting the integrity of state and local governments." *City of Rome v. United States*, 446 U.S. 156, 201 n.12 (1980) (Powell, J., dissenting). To remove the hybrid governmental service of land-use planning and control from those directly affected and concerned is to allow rule by those whose existence and destiny and, therefore, perspective is totally removed from the consequences without accountability to those affected.[8] It would cut to the core of federalism.

C. LAND IS NOT A COMMODITY READILY SUSCEPTIBLE TO UNIFORM NATIONWIDE PLANNING OR REGULATIONS

Land-use control and planning is, in fact, a state's use of its lands based on a quasi-property interest. Accordingly, the state's relationship to its lands has been

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[8] "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York*, 60 U.S.L.W. 4613 (1992), quoting *Coleman v. Thompson*, 501 U.S. ___, 115 L.Ed.2d 640, 675, 111 S. Ct. ___ (1991) (Blackmun, J. dissenting).

afforded special treatment. *See, Kansas v. Colorado,* 206 U.S. 46, 93 (1907). For example, land within a state's boundaries is subject to public or state use in the form of a servitude by which the state can restrict the owner's right to use the property for the benefit of the state and its citizens without a "taking" necessarily occurring, in part because of the presumed local benefit-burden resulting from land use planning and control. *See, Keystone Bituminous Coal Assoc. v. De Benedictis,* 480 U.S. 470 (1987).

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of Federalism is the Fifth Amendment protection afforded property rights which cannot be "taken for public use, without just compensation." Historically, Congress has expressly provided compensation mechanisms when it determines that private property must be taken for public use.[9] Because there is an average reciprocity of advantage, there may be situations when compensation is not required.

> "Any limitation so severe [as a confiscatory regulation] cannot be newly legislated or decreed (without compensation), but must inhere in the

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[9] For example, programs to acquire private lands to remain essentially in their natural state for the public benefit, be they wetlands, coastal areas, and other open spaces for parks, wildlife refuges, and the like. *See, e.g.,* Emergency Wetlands Resource Act of 1986, 16 U.S.C. §§ 3921-3923; The Recreation Use of Conservation Areas Act of 1962, as amended, 16 U.S.C. § 460 K-1; The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601; The National Wildlife Refuge System Administration Act, 16 U.S.C. § 668 dd(3); The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715; Federal Land Policy and Management Act, 43 U.S.C. § 1748.

> title itself, in the restrictions that background principles of the *State's* law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the *State's* law of private nuisance, or by the *State* under its complimentary power to abate nuisances that affect the public generally or otherwise."

Lucas v. South Carolina Coastal Council, 60 U.S.L.W. 4842, 4849 (1992) (emphasis added).

This average reciprocity of advantage emphasizes the elements of self-determination and accountability within Federalism concepts. Allowing the federal government, under the Commerce Clause, to dictate land use control and planning concepts based on "substantial and adverse effects" upon commerce would either effectively remove or so dilute the local benefit to landowners and leave only the burden, as to impinge directly upon Fifth Amendment rights.[10]

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[10] *See, Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall.") *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 318-19 (1987) (takings clause is " 'designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.' " (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Commission,* 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [ ] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

In today's urbanized society, one of the most essential attributes of sovereignty possessed by the States of Oregon, Washington, and their political subdivisions and one which is constitutionally protected is this hybrid governmental service of land-use planning and control through the states' use of their lands for the benefit of their citizens. That Congress has not previously sought to impose nationwide, uniform and mandatory land use requirements undoubtedly reflects a recognition of the uniqueness of each parcel of land. Land traditionally has been subject to the equity jurisdiction of the courts so as to provide flexibility and avoid the harsh results that might be obtained if considered under rigid rules of law. *IV Pomeroy's Equity Jurisprudence* § 1402 p. 1034, 2 Story, Equity Jurisprudence §§ 829-843, 993.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should issue to review the decision of the Ninth Circuit Court of Appeals. The insidious assault which that decision permits against our constitutionally protected federal form of government must be turned back.

Respectfully submitted,

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No. 92-52

In The

Supreme Court of the United States

October Term, 1992

COLUMBIA GORGE UNITED – PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

EDWARD MADIGAN, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Respondents.

and

FRIENDS OF COLUMBIA RIVER GORGE,

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Supreme Court

BRIEF OF AMICI CURIAE WASHINGTON STATE GRANGE AND NORTHWEST LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, The Washington State Grange and the Northwest Legal Foundation, submit this amicus curiae brief in support of petitioner's petition for writ of certiorari. The members of the Washington State Grange are individuals. They are mostly farmers and rural townspeople. It is their liberty, and that of their neighbors, that has been greatly reduced by the Columbia Gorge National Scenic Area Act. 16 U.S.C. §§ 544-544p.

The Washington State Grange is particularly concerned with the powers given to an appointed commission which can impose limitations and/or requirements forcing or prohibiting conversion of farm land to more intensive farm uses or to homes, and the lack of opportunity for meaningful input their members will have in such decisions.

The Northwest Legal Foundation (NLF) is a nonprofit foundation, incorporated under the laws of Washington for the purpose of participating in litigation and education that affects the public interest.

The Board of Directors of the NLF, composed of concerned citizens, a majority of whom are attorneys, authorizes participation in a case only when it concludes that the NLF's position has broad public support. The Board of Directors has authorized the NLF's involvement in this case.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW

This case involves whether or not state and county land use plans and ordinances can be dictated

by the federal government. It is our contention that this case falls squarely in the prohibition of federal control of state statutes articulated in *New York v. United States*, 60 U.S.L.W 4603, 1992 WL 134695 (U.S. June 19, 1992).

However, because the Ninth Circuit Court of Appeals validated the Gorge Act prior to the *New York* decision, this law will not only stand, it will also be used as a model for further federal laws on land use, unless overturned by this Court. Congress is unlikely of its own volition, to apply the *New York* holding, dealing with nuclear waste, to the appeals court tested land use law here.

Individual freedom is vitally linked to land use controls and property rights. "A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Yet the Gorge Act places land use controls in the hands of an unelected commission that is not a federal agency, but must follow federal standards. 16 U.S.C. § 544c.

This Court has noted that state sovereignty is assured in the Constitution in order to protect individual liberties. *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695 (U.S. June 19, 1992).

We respectfully submit that state sovereignty and the individual rights of thousands of citizens in the Gorge Area will be seriously abridged and abused unless this Court grants certiorari.

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals erred by ruling that the Columbia River Gorge Act is valid even though it is a federal act requiring state law making.

2. The Court of Appeals erred in holding that the Commerce Clause authorizes the Columbia River Gorge Act, because changing scenery does not adversely affect interstate commerce.

3. Only selected U.S. citizens are required to be subject to land use planning by an unelected commission. The Court of Appeals erred in not ruling that, even if the Gorge Act is authorized by the Commerce Clause, the Act violates the Privileges and Immunities Clause, and is therefore invalid.

4. The Gorge Act sets up a commission which is appointed, not elected. The Court of Appeals erred in not ruling that even if the Gorge Act is authorized by the Commerce Clause, it violates the Republican form of Government guarantee, and is therefore invalid.

ARGUMENT

I

THE GORGE ACT IS INCONSISTENT WITH THE FEDERAL STRUCTURE OF OUR GOVERNMENT

A. THE GORGE ACT IS MANDATORY

The Gorge Act directly, and through requirements imposed on local legislators and an appointed commission, regulates all land use planning and land uses in the Gorge Area. Only this one specific area of the country, the

Columbia River Gorge Area, is so regulated. § 544b (a). Eighty four and one half percent (84.5%) of the 285,000 acres in the Gorge Area is *private* land.

The federal government regulates land use planning by designating specific "urban areas," including Hood River, Oregon, North Bonneville, Washington, and White Salmon, Washington. Then an appointed commission is established, § 544c. The Commission is instructed, step by step, how to adopt management plans for this extensive area of privately owned land, § 544d. It is important to understand the Gorge Commission is *not* an agency of the federal government. § 544c (a)(1)(A).

After adoption of a management plan, the Commission submits it to the Secretary of Agriculture for review. § 544d (f). Even if the commission uses a secretarial override provision, the commission's management plan for private property and businesses must be consistent with the standards and purposes of the Gorge Act. §§ 544d (f)(3)(B). Therefore, there is *no option* on whether or not the commission follows the Act's standards when adopting a management plan.

Local counties are then required to adopt ordinances "consistent with the management plan." § 544e (b)(1). If the counties refuse, the commission shall publish and impose its own ordinance. § 544e (c). Local counties must either legislate an ordinance consistent with federal standards or the federally created commission, which is not an agency of the federal government, shall write local ordinances, controlling land use.

This entire system was set up *prior* to any interstate compact. The federal statute states, "the states of Oregon

and Washington *shall* establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . " § 544c (a)(1)(A) (emphasis added). This does, in fact, destroy the state sovereignty in a fundamental area – the uses of land within its sovereign boundaries.

B. FEDERAL LAW WHICH DIRECTS STATE LAW EXCEEDS CONGRESSIONAL AUTHORITY

"No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695, at *20 (U.S. June 19, 1992). The Gorge Act requires either counties in the Gorge Area, or the Gorge Commission, to enact and enforce ordinances consistent with the federal standards. 16 U.S.C. §§ 544e (b)(1) and (c)(1). It requires the Gorge Commission to enact management plans consistent with federal standards. Failure to do so results in violation of federal law and resulting penalties.

Counties are political subdivisions of their respective states. Local government bodies must derive their power from a sovereign, and that sovereign is the state. *Missouri v. Jenkins*, 495 U.S. 33 (1990). See *Gearin v. Marion County*, 223 P. 929 (Or. 1924) and *State ex rel. Taylor v. Superior Court for King County*, 98 P.2d 985 (Wash. 1940).

Likewise, the Gorge Commission must obtain its authority from a sovereign. As Congress has denied federal authority, the states must be the sovereign. The

Gorge Commission members are appointed by state governors and county officials, so their creation is by the states (at the compulsion of the federal government).

The federal government has required states to regulate here. The Columbia River Gorge Act falls squarely in the *New York* prohibition, and is therefore invalid.

II

RETENTION OF LOCAL LAND USE PLANNING DOES NOT ADVERSELY AFFECT INTERSTATE COMMERCE

The Court of Appeals found constitutional authorization for the Columbia River Gorge Scenic Area Act, 16 U.S.C. §§ 544-544p, in the Commerce Clause. *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992).

While the commerce clause has been interpreted to include authorizing regulation of many things other than actual interstate commerce, it has never been applied to general land use planning. See *Wickard v. Filburn*, 317 U.S. 111 (1942). When a particular land use was regulated by the federal government, and upheld as a commerce power, the regulation was directed at individual citizens, not to governing bodies. *Hodel v. Indiana*, 452 U.S. 314 (1981).

The regulation of land use to "protect" scenery does not even meet the minimal rational basis test of *Hodel v. Indiana*, 452 U.S. 314 (1981). Direct regulation of land use is not authorized by the commerce clause, or any other

clause. Powers not expressly given to the federal government are reserved to the states. U.S. CONST. amend. X.[1]

In *Hodel*, the regulated land use was singular, that of surface mining. Also in *Hodel* the appellees did not claim that surface mining did not create a perceived environmental hazard, such as water pollution, that may have effects on other states. Here, we do claim that there is not an environmental hazard that may have effects on other states from building a house, subdividing land, building a barn, or an office building, or converting from cattle raising to growing wheat. Petition for writ of certiorari p. 14. Land use in general, while it may change scenery, it does not adversely affect interstate commerce. Further, no criteria exist which measure, or can measure, quality of scenery. Permitting this act to stand will leave such decisions in the hands of the unelected.

Even if the Court were to find that construction on private land is affecting interstate commerce, the Gorge Act is fatally flawed for other reasons.

III

THE GORGE ACT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

The issue of unequal treatment of citizens in one geographic area, was before the Court of Appeals in this

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[1] Amendment X: "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people."

case. 960 F.2d 110, 115 (9th Cir. 1992), Petition for Writ of Certiorari, p.9. The Petitioners call this an equal protection challenge, but the same issue can be analyzed under the Privileges and Immunities Clause.[2]

It may not be necessary here to answer the question of whether the Congress can constitutionally regulate land use directly throughout the United States. However, Congress has designated particular towns as "urban areas." 16 U.S.C. § 544b. Establishment of scenic area (e) urban areas. These boundaries may only be changed by the Gorge Commission (an unelected body), and then only if a demonstrable need exists to accommodate long range urban population growth . . . 544b (f). Revision of Urban Area boundaries.

No explanation nor criteria is given as to why these towns are designated urban. Hundreds of other towns across the country near scenically beautiful land, are not so designated. Can it be that farms and houses in the Gorge Area affect interstate commerce, while farms near other state borders or even away from borders do not?

What is the basis for this unequal treatment? The Privileges and Immunities clause should invalidate such unequal treatment of Washington and Oregon citizens compared to citizens of other states.

The Clause has been interpreted by this Court to include privileges and immunities which are fundamental, which "belong, of right, to the citizens of all free

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[2] U.S. CONST. art. IV, § 2. The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens of the several states.

governments . . . *Corfield v. Corvell*, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230). General headings for the fundamental privileges and immunities include "the right to acquire and possess property of every kind." *Corfield*, 6 F. Cas. at 551. This right must include the right to common law uses, if it is to have any meaning. *Lucas v. South Carolina Coastal Council*, 1992 WL 142517 (U.S. June 29, 1992). Background principles of state property law or nuisance must be identified by the government before private land can be converted to public use through regulation. *Lucas v. South Carolina Coastal Council*, 1992 WL 142517 (U.S. June 29, 1992). It is likely that in an effort to "protect scenery", the government would prohibit all economically viable land uses of hundreds, if not thousands of parcels of land. No administrative method of paying compensation to these selected property owners is provided for in the Gorge Act.

Here, the right to possess and use one's property is being denied some United States citizens based on a congressional action. Congress has designated one special area of the country, eighty four and a half percent (84.5%) privately owned, a national scenic area. The federal statute does not compel land use plans and ordinances in all scenic areas, or even all scenic areas near state borders.

While the Court of Appeals noted that the Columbia River Gorge area was one of "critical national significance," 960 F.2d 110, there is no such specific finding by Congress, nor are there any criteria for what makes an area of predominantly privately owned property susceptible to scenic area designation. Such arbitrary action by Congress violates the privileges and immunities of the United States citizens living in the Gorge Area.

IV

THE GORGE ACT GREATLY DIMINISHES THE REPUBLICAN FORM OF GOVERNMENT IN PARTS OF WASHINGTON AND OREGON

The Guarantee Clause of the United States Constitution provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." Article IV, § 4.

The Gorge Commission established in the Gorge Act is an appointed body. For each state, three members are appointed by their county governing body and three members by the state's governor. § 544c (a)(1)(c). There is also one non voting member who is an employee of the Forest Service, appointed by the Secretary of Agriculture. § 544c (a)(1)(C)(i). In 240,000 acres of The Gorge Area, private land use is controlled by an appointed body.

State sovereignty will be protected if this Court finds that general land use regulations do not affect interstate commerce. Even if the commerce clause is found to authorize regulation, however, an incidence of state sovereignty will be protected here only by a limitation on the commerce power.

" . . . where the Federal Government compels states to regulate, the *accountability* of both state and federal officials is diminished. *New York v. United States*, 60 U.S.L.W. 4603, 1992 WL 134695, at *15 (emphasis added). Here the federal government has compelled land use planning and controls. §§ 544-544p. "Accountability is thus diminished when, due to federal coercion, *elected* state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by

federal regulation." *New York v. United States*, 1992 WL 134695, at *15 (emphasis added). Here, the commission that regulates land use, either directly or through veto power over county ordinances, is not even *elected*. General land use planning and ordinances are enacted by an appointed commission.

This flies in the face of both the Washington and Oregon Constitutions, as well as Republican principles.

The Constitutions of both Oregon and Washington reserve all legislative power to their respective legislatures. The Oregon Constitution, Article II, § 18, provides for recall of elected public officials (not possible with the Commission) and prohibits to the legislature the exclusive power of lawmaking,[3] and prohibits limitation of the peoples' referendum powers (not possible with the Act or Compact); Oregon Constitution, Article XI, § 2, requires voter approval before imposition of new local government apparatus (which most decidedly did not occur here).

The Oregon legislature may not impose a new local government apparatus on a select group of people without giving them the chance to approve or veto the proposal. *Lagrande/Astoria v. Public Employment Relations Board*, 576 P.2d 1204, 1215 (Or. 1978); *Reilley v. Paulus*, 607 P.2d 162, 165 (Or. 1980). *But see Mid-County Future Alternatives Committee v. City of Portland*, 795 P.2d 541, 548-49 (Or. 1990) (*Reilley* not followed). A law is local or

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[3] Recall that the Commission can write local land use ordinances. 16 U.S.C. §§ 544d, 544f.

special if it is intended to affect only certain persons or localities. *State ex rel. Public Welfare Commission v. County Court of Malheur County*, 203 P.2d 305, 315 (Or. 1949).

Similarly, Washington Constitution, Article I, § 1, states: "All political power is inherent in the people"; Washington Constitution, Article I, § 33, provides for recall of elected public officers; Washington Constitution, Article XI, § 4, requires uniformity of county governments (not possible when the Commission rules selected counties or portions thereof); and Washington Constitution, Article XI, § 5, requires election of county officers. The legislature cannot take from the people the right of local self-government secured to them by their state constitution. *State ex rel. Tax Commission v. Redd*, 6 P.2d 619, 622 (Wash. 1932).

The Gorge Act infringes the rights of some property owners in Washington and Oregon to vote for persons with the power to affect their property. Because the Act and compact adversely affect the rights of franchise, which are protected by these state constitutions, the compact has violated State Constitutions. The state officials who voted for the compact, as directed by Congress in § 544, lacked the power to convey the voting rights of their citizens.

In addition, Congress has not only failed to protect and guarantee a Republican form of government here, it has actively moved to selectively deny individual citizens the right to vote for the people who make decisions on their land use.

CONCLUSION

The purpose of the Act is defeated by invalidation of the Gorge Commission and the requirements for local ordinances. Therefore, this interrelated scheme of federal dictates over local land use must fail in toto. Unless the Court accepts certiorari, the Act will be considered valid and will not only continue to operate, but likely be used as a pattern for other congressional actions. The potential for abuse is staggering, the consequences devastating to people who have a tradition of government protection of private property for their use. The Gorge Act turns around a 200 year tradition of limited government and replaces it with government greatly limiting citizens. We urge the Court to grant the petition for certiorari.

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Respectfully submitted,

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